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Supreme Court, U.S.
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No. 10-10-490

In The

Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

MARK ANTHONY OTT,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Booth v. Maryland*, 482 U.S. 496 (1987), this Court held that the Eighth Amendment erected a *per se* bar against a capital sentencing jury considering two types of victim evidence: (1) "victim impact evidence," which relates to the victim's personal characteristics and the emotional impact of the victim's murder on family members, and (2) the victim's family members' characterizations and opinions about the crime, defendant, and appropriate sentence.

In *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court partially overruled *Booth*, holding that the Eighth Amendment did not bar victim impact evidence or the first type of victim evidence. *Payne* expressly left unanswered whether the Eighth Amendment still bars the second type of victim evidence.

The questions presented are:

1. Should this Court overrule the remaining part of *Booth* holding that the Eighth Amendment erects a *per se* bar against a victim's family members' characterizations and opinions about the crime, defendant, and appropriate sentence?

2. To the extent that any part of *Booth* survives, does it apply to a sentencing proceeding in which death is not option?

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PETITION FOR WRIT OF CERTIORARI

The State of Utah respectfully petitions for a writ of certiorari to review the judgment of the Utah Supreme Court in this case.

OPINIONS AND ORDERS

The opinion of the Utah Supreme Court is reported at 2010 UT 1, ___ P.3d ___ (App. 1-33). The order of the Utah Supreme Court denying the petition for rehearing under review is unreported (App. 34).

JURISDICTION

The decision of the Utah Supreme Court was entered on January 5, 2010. (App. 1). The State's petition for rehearing was denied on June 11, 2010 (App. 34). The State was granted an enlargement of time until October 12, 2010 to file its petition. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Utah Code Ann. § 76-3-207(2) (West 2004):

(a) In capital sentencing proceedings, evidence may be presented on:

(i) the nature and circumstances of the crime;

(ii) the defendant's character, background, history, and mental and physical condition;

(iii) the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims; and

(iv) any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence.

(b) Any evidence the court considers to have probative force may be received regardless of its admissibility under the rules of evidence. The state's attorney and defendant shall be permitted to present argument for or against the sentence of death.

STATEMENT OF THE CASE

1. **Summary of Facts.** At 2:30 a.m., September 1, 2002, Respondent Mark Anthony Ott cut the phone lines to his estranged wife's home. R. 1378:144, 199. Armed with a knife, lighters, and Coleman fuel, he then burst into her home. R. 1374:174-76; R. 1375:148-49, 151-53, 156. Ott went directly to his wife's bedroom where he stabbed her boyfriend, Allen

Lawrence, 23 times. R. 1375:15-19. When Ott's teenaged stepdaughter tried to intervene, he stabbed her in the stomach. R. 1374:85. Ott then doused his wife's bed with gasoline and lit it, a couch, and a loveseat on fire. R. 1375:24-25.

Lawrence, Ott's wife, and her two teenaged daughters and their friend, all managed to escape the burning house. But Lawrence's six-year-old daughter Lacey, who had been momentarily forgotten, died in the fire. R. 1376:99, 103, 105-06, 114.

2. **Trial court proceedings**. Ott was charged with aggravated murder, Utah Code Ann. § 76-5-202 (West 2004), and several other aggravated felonies. R. 1-4, 35-37. In Utah, aggravated murder is punishable by death, life without the possibility of parole, or an indeterminate prison term of 20 years to life, for which parole is available. Utah Code Ann. § 76-3-206 (West 2004). On the day trial was to begin, Ott entered an *Alford* plea to the aggravated murder charge and guilty pleas to attempted aggravated murder and aggravated assault. R. 1122, 1135. In exchange, the State dropped the other charges and agreed not to pursue the death penalty. R. 1135. The parties agreed that a sentencing jury would decide whether Ott should be sentenced to life with or without the possibility of parole. R. 1135.

The sentencing phase lasted five days, three of which were spent on Ott's mitigation case. The jury heard from 27 witnesses, and the evidence and

argument spanned over 1,000 pages of transcript. *See generally* R. 1374, 1375, 1376, 1377, 1378.

Most of the State's presentation included evidence about the horrific circumstances of the charged crimes; Ott's harassing, threatening, and violent conduct leading up to his crimes; and his violent and out-of-control behavior in jail – 114 incidents in all – while he awaited trial. *Id.*

Victim testimony. After testifying regarding the crimes and Ott's conduct leading up to those crimes, the victims present in the house that night also testified regarding the effect the attack had on them, their opinion of Ott's character, their belief that he was incapable of changing, and their fear that if ever released, Ott would harm them again.

Ott's by then ex-wife testified that if Ott were ever released, she believed he would come looking for them and try to harm them again. App. 18-19. She stated that she did not believe he would change, because he was a "control freak." App. 19.

One of Ott's stepdaughters – the one he stabbed – testified that she had been unable to sleep since that night. App. 19. She testified that based on having lived with Ott for some years, she did not believe he was capable of changing. App. 19-20. She testified that she was "terrified" of Ott, even though he remained in prison, and that she would "hate to see how scared [she]'d be if he was actually out." App. 20.

Ott's other stepdaughter – who had also lived some years with Ott and who was in the house that night – testified that she was "very much" afraid of Ott and that if he were ever released, "it doesn't matter how old he's going to be, I think that, you know, he'll finish what he went there to do. I honest to God I [sic] feel that way." App. 20.

Lawrence – who, in addition to his child's death, had suffered on-going harassment and 23 stab wounds at Ott's hands – testified that in imposing sentence, the jury needed "to take what kind of guy this person is into consideration." App. 17. Lawrence stated that Ott's crimes showed what kind of man he was and that he had "used up all his chances":

> He's shown what he truly is, the kind of man he is . . . these types of crimes are committed by certain types of people and he just happens to be one of them. They are psychopathic in nature. They have no respect for other people's rights. No respect for other people's pursuit of happiness. No respect for other people's feelings. They can kill and they don't have any more feeling for killing someone than if they reached up and picked an apple off of a tree. They don't feel it. That's the kind of guy this is. I don't think he'll ever change. I don't think he should ever have the opportunity to again perpetrate his violent nature on any human being anywhere again ever. He doesn't deserve it. He's used up all his chances. He's shown who he is and what he does when he does not get his

> way. He's shown us. He showed his hand. That's what he is. That's is [sic] the defining moment of that man's life. That five minute episode defined him as what he is. That's what Mr. Ott is. That's him.

App. 17. When asked if he believed, based on his personal experience, that Ott would have helped Lacey out of the house if he had known she was there, Lawrence characterized Ott as an unfeeling "terrorist":

> I don't think he would have done a damn thing different. This man is a terrorist. He deals with anarchist cookbooks. He looks at how bombs are built. When he set that house on fire this isn't like building a campfire with a grocery sack. This is a bomb. If I dumped gallons of gasoline on this floor right here and lit it with a match, can you imagine how explosive that would be? It goes up instantly. I've thrown little bits of gas on a campfire to start one. It flares up instantly. Can you imagine that much gasoline in the house? . . . He didn't care. This guy does not care about other people's feelings. He has no empathy for anybody, none. He doesn't have it. It's not inside of his character to have that.

App. 18.

The prosecution also presented the testimony of Lacey's older sister and mother, neither of whom were present the night of the crimes. Lacey's sister testified that the thought of Ott being released "terrifie[d]" her and that she believed Ott "wouldn't

change at all." App. 21. She could not "see how anybody could do what he did." *Id.* She stated that if it had been up to Ott, her "dad would not be here at all . . . But it could have very well been me instead of my little sister, or both of us." *Id.* She wanted the jury to know that Ott "does not care":

> He doesn't care what happened that night. He doesn't care if it was me or my sister or everybody in that house. He burned it down. He didn't help anybody out of it. He didn't try to pick out one person out of five. He wanted just for us, my dad. He was there for whoever and whatever was in that house. I mean, the house could have caught on fire to the next door neighbors. He didn't care who died. He didn't care who got hurt. I know his intention was to kill my dad, but instead he killed my little sister. And I don't think he deserved anything more than what she got. She can't be here today to say what she thinks. I don't think that he deserves any rights. He shouldn't have any rights. He took all of hers away from her, and I don't believe that he should have any.

App. 21-22.

Responding in part to defense counsel's opening statement asking the jury to walk in Ott's shoes (R. 1374:56-57), Lacey's mother testified that she hoped that Ott never got out on parole, because he did not deserve it:

> I think he should have to walk in my shoes. I think you should have to walk in my shoes

> 'cause my last two years have been horrible. You know what? They are not going to get better. I loved my daughter. The love I had for my daughter was so strong. You can't take that away . . . and I hate to say this, but I hope you don't get out on parole because you don't deserve it. My daughter don't get to come back to me right now. I didn't get to finish with my daughter's life. I have to go home tonight without my daughter there, and I have to be alone for the rest of my life. I hope you can think about that for the rest of your life.

App. 22.

The defense did not object to any of the foregoing evidence.

Ott's evidence: In mitigation, Ott put on testimony that he had served his country for years, including a stint in the Gulf War. R. 1377:119-23. Ott's mitigation specialist detailed his military service and the medals he had received for meritorious service. R. 1377:121-23. Ott presented testimony that he suffered physical abuse as a child and post-traumatic stress syndrome and depression upon his return from the Gulf War. R. 1377:123-77; *see also* R. 1376:176-78, 183-84, 186. Ott also presented expert testimony suggesting that he had been suffering from undiagnosed bi-polar disorder and that proper medication had improved his behavior in jail. R. 1378:80-90, 103. Ott also called friends and family members to testify that he was a "good guy" and father and had no real

anger problems until after he married his wife; his violent acts were an anomaly, and not in keeping with his character; his wife and Lawrence shared some of the responsibility for Lacey's death; he did not intend to kill anyone on the night of the crimes; and he should be given a chance at parole. R. 1376:175, 178, 190-91, 203, 206, 207-10, 212, 232-47; R. 1377:14, 18-19, 26-33, 42, 52, 55-58, 72-73, 86, 248.

Ott did not testify at the sentencing hearing, but, as permitted by Utah law, he did make an unsworn statement to the jury. He admitted that he intended to kill Allen Lawrence and that he stabbed his step-daughter when she tried to stop him. R. 1378:134. He told Lacey's mother "and everybody who loved Lacey," that he was "truly sorry for what happened" and that he "mourned" for Lacey "every night." R. 1378:134-35. He said that he could "empathize" with Lacey's mother, particularly because, in the intervening 18 months, he had not been able to see his own children. Ott then told the jury that he hoped that "one day I'll have the opportunity to be put on parole." *Id.*

The jury, on a vote of ten to two, imposed life without the possibility of parole. On appeal, Ott challenged his sentence on several grounds, including the admission of "victim impact evidence." In a single sentence, which cited only *Payne v. Tennessee*, 501 U.S. 808 (1991) for support, Ott asserted that the Eighth Amendment "bans family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence to be imposed." Br. Aplt. at 87. Ott also challenged admission of the evidence

on due process grounds under both the federal and state constitutions. *See id.* at 86-95. Because Ott had not preserved his victim impact evidence claim, he argued that his counsel was constitutionally ineffective for not moving to exclude it.

3. **Utah Supreme Court Decision**. On appeal, the Utah Supreme Court reversed Ott's sentence on the sole ground that the Eighth Amendment *per se* barred both the victims and Lacey's surviving family members from addressing the defendant's character, his chances for rehabilitation, and the appropriate sentence. App. 15-16, 31-32. The court relied on *Booth v. Maryland*, 482 U.S. 496 (1987), "which held the Eighth Amendment barred victim impact evidence." App. 15. The Utah court acknowledged that this Court in *Payne* partially overruled the part of *Booth* that held that the Eighth Amendment did not bar, *per se*, victim impact evidence – i.e., evidence of the victim's personal characteristics and the effect the victim's death had on the family. The Utah court concluded, however, that "to the extent *Payne* overruled *Booth*, *Booth* retained viability for its holding that victim impact evidence that addresses the defendant's character or expresses the victim's opinion of the appropriate sentence at the penalty phase of trial is inadmissible under the Eighth Amendment." App. 15.

The Utah Supreme Court concluded that "large portions of the victim impact evidence . . . featured the victims' opinions of the defendant's character or the appropriate sentence and were therefore clearly

at odds with United States Supreme Court precedent" in *Payne* and *Booth*. App. 16, 23. The court found trial counsel "objectively deficient for failing to object to victim impact evidence that addressed Mr. Ott's character, chances for rehabilitation, and deserved sentence because such victim impact evidence clearly violates the Eighth Amendment when introduced in capital sentencing hearings." App. 32. The court concluded that "but for the admission of the victim impact evidence that addressed Mr. Ott's character and the victims' opinions of the appropriate sentence, Mr. Ott would have received a more favorable sentence." App. 27.

Petition for rehearing. The State timely petitioned for rehearing, pointing out that *Booth*, a case that neither party had relied on, by its plain terms applied only when the death penalty was at issue. The Utah Supreme Court denied the petition without explanation.

REASONS FOR GRANTING THE PETITION

Summary of Reasons

Relying on *Booth v. Maryland*, 482 U.S. 496 (1987), the Utah Supreme Court held that it constitutes cruel and unusual punishment for crime victims and a murder victim's family members to testify in a capital sentencing hearing – whether or not death is an option – regarding their opinions and characterizations of the crime, defendant, and appropriate

sentence. But in *Payne v. Tennessee*, 501 U.S. 808 (1991), this Court expressly left open whether the Eighth Amendment continues to bar this type of victim evidence.

That question – the first question presented for review – has been unanswered by this Court for nearly two decades. This Court should now answer the question by overruling *Booth*'s blanket bar to such evidence. Just as this Court determined in *Payne* that *Booth* wrongly held that victim impact evidence had no relevance to the capital sentencing decision, it should now recognize that victims' characterizations and opinions of the crime, defendant, and appropriate sentence can also, in some circumstances, be relevant to that decision. This is especially true where, as here, all but two of the victims personally witnessed the defendant's crimes and had a personal relationship with him. Their personal observations of the defendant's character and criminal conduct were all relevant to assessing his future dangerousness and whether he was an appropriate candidate for eventual parole. But, as long as *Booth* stands, this relevant evidence is *per se* barred by the Eighth Amendment.

This Court's long silence on the subject of victim evidence has resulted in a clear split of authority on what, if any, part of *Booth* survived *Payne*. The Tenth Circuit Court of Appeals – like most courts – agrees with the court below that, under *Booth*, the Eighth Amendment erects a *per se* bar to victim testimony regarding a capital defendant's character and the appropriate sentence. But a criminal court of last

resort in that circuit – the Oklahoma Court of Criminal Appeals – has reached the opposite conclusion, holding that "in light of the discussion in *Payne*, whatever ban against this evidence there may be does not lie in the Eighth Amendment." *Ledbetter v. State*, 933 P.2d 880, 890 (Okla. Crim. App. 1997). The Oklahoma courts, therefore, have consistently allowed victims in capital cases to recommend the appropriate sentence within the limitations imposed by due process. The Utah Supreme Court's decision has deepened that existing conflict.

Because this Court's opinions in *Booth* and *Payne* are the source and center of this controversy, only this Court can settle the dispute. There is no value in letting the conflict percolate longer than it already has, because courts on both sides of the split have, after expressly considering the alternative, conclusively and repeatedly stated their conflicting opinions. Indeed, the Oklahoma Court of Criminal Appeals has interpreted this Court's denial of past petitions for certiorari presenting the question as implicit approval of its position.

There is also a split of authority among lower courts on the second question presented for review: whether, assuming *Booth*'s Eighth Amendment proscription stands, *Booth* applies in a sentencing proceeding where death is not an option. Despite *Booth*'s clear statements that its holding applies only in the death penalty context, the courts of last resort in three states – Utah in this case and Ohio and Kansas – have concluded that *Booth* applies in non-death

sentencing proceedings. The majority of federal and state courts addressing the issue, however, have reached the opposite conclusion.

The questions presented are a matter of national importance. The constitutions or statutes of at least forty-eight states, including Utah, either explicitly or implicitly grant victims the right to be heard at sentencing hearings. Nearly half of those states allow victims to be heard regarding the crime, defendant's character, and/or the appropriate sentence. The decision below implicates the constitutionality of those provisions.

This Court, and only this Court, can answer these questions with a straightforward clarification: *Payne*'s holding that "the Eighth Amendment erects no *per se* bar," against victim impact evidence extends to victim statements about the crime, defendant's character, and the appropriate sentence. *Payne*, 501 U.S. at 827. "There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* And any risk that such evidence would be unduly prejudicial may be addressed by applicable evidentiary rules or by the Due Process Clause, in those cases where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair." *Id.*

I. This Court Should Answer the Two-Decades-Old Question of Whether the Eighth Amendment Continues to Bar All Victim Opinion on the Crime, Defendant's Character, and Appropriate Sentence.

The controversy in this case centers on the question left open by this Court in *Payne v. Tennessee*, 501 U.S. 808 (1991), when it partially overruled *Booth v. Maryland*, 482 U.S. 496 (1987). In *Booth*, this Court held in a 5-4 decision that the Eighth Amendment erected a *per se* bar to a capital sentencing jury considering two types of victim evidence: (1) "victim impact evidence," which relates to the victim's personal characteristics and the emotional impact of the murder on the victim's family, and (2) a victim's family members' characterizations and opinions about the crime, defendant, and appropriate sentence. *Booth*, 482 U.S. at 502-03. In *South Carolina v. Gathers*, 490 U.S. 805 (1989), this Court extended this bar to prosecutorial argument in a capital sentencing proceeding.

This Court revisited the issue four years later in *Payne*, holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827. In so holding, the Court overruled that part of *Booth* prohibiting victim impact evidence – the first kind of victim evidence at issue there. The Court noted, however, that while the Eighth Amendment did not bar such evidence, the Due Process Clause might, if

in a given case the evidence introduced "is so unduly prejudicial that it renders the trial fundamentally unfair." *Id.* at 825.

But *Payne* expressly left open the question of whether the Eighth Amendment continued to erect a *per se* bar to the second kind of victim evidence addressed in *Booth*:

> Our holding today is limited to the holdings of *Booth v. Maryland* and *South Carolina v. Gathers* that evidence and argument relating to the victim and the impact of the victims' death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Payne, 501 U.S. at 830 n.2 (citations omitted). *See also id.* at 833 (O'Connor, J., concurring) ("*Booth* also addressed another kind of victim impact evidence – opinions of the victim's family about the crime, the defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial."). The only reason the question remained open in *Payne* was that it was not at issue there. It is squarely at issue here, however, and, as shown below, will continue to be at issue with

conflicting results among the States, unless this Court intervenes.

A. *Booth*'s blanket bar unnecessarily excludes otherwise relevant victim evidence.

In the two decades since *Payne*, this Court has not addressed the admissibility of victim evidence in either capital or non-capital sentencing proceedings. This Court should now take the opportunity to answer the question it left unresolved in *Payne*.

In erecting a *per se* bar to all victim impact evidence and victim opinion of the crime, defendant's character, and appropriate sentence, *Booth* assumed that such evidence was never relevant in a capital sentencing proceeding. *See Booth*, 482 U.S. at 503-09. In *Payne*, this Court recognized the invalidity of that assumption with respect to victim impact evidence – i.e., evidence of the victim's character and the impact of the victim's murder on family members. *See Payne*, 501 U.S. at 819-27. The *Payne* court explained that "the assessment of harm caused by the defendant as a result of the crime charged" had long been an important relevant consideration in deciding a defendant's punishment, both in death and non-death cases. *Id.* at 819. Victim impact evidence was "simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question." *Id.* at 825.

Payne recognized that *Booth*'s blanket ban on victim impact evidence prevented the jury "from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Id.* at 826. While "virtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances," under *Booth*, "the State [was] barred from either offering 'a quick glimpse of the life' which a defendant 'chose to extinguish,' or demonstrating the loss to the victim's family and to society which has resulted from the defendant's homicide." *Payne*, 501 U.S. at 823 (citation omitted). The *Payne* court concluded that the State had "a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and in particular to his family." *Id.* at 825 (internal quotation marks and citation omitted).

Just as *Booth* wrongly imposed a blanket ban on all victim impact evidence, it wrongly banned all victims' opinions of the crime, defendant's character, and appropriate sentence. As this Court recognized in both *Booth* and *Payne*, the decision on whether a defendant should be executed must be an "*individualized* determination . . . based on 'the character of the individual and the circumstances of the crime.'" *Booth*, 482 U.S. at 502 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)) (emphasis in *Zant*). *See also*

Payne, 501 U.S. at 818. Consistent with that authority, Utah, like most states, expressly permits both the State and the defendant to present evidence in capital sentencing hearings on (1) "the nature and circumstances of the crime"; (2) "the defendant's character, background, history, and mental and physical condition"; (3) "the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims"; and (4) "any other facts in aggravation or mitigation of the penalty that the court considers relevant to the sentence." Utah Code Ann. § 76-3-207(2).

Just as Ott did here, capital defendants regularly put on character evidence through family, friends, employers, and experts to portray the defendant as a good, caring, contributing member of society with a likely prospect for rehabilitation. *See, e.g., Payne*, 501 U.S. at 814 (girlfriend testified defendant was "very caring person" and good father to her children and that his crimes were generally inconsistent with his character; psychiatrist testified defendant was "most polite prisoner he had ever met"; parents testified defendant did not drink or abuse drugs, was good painter, good with children, and good son). Indeed, this Court has long held that the Constitution affords capital defendants broad latitude in having the sentencer consider such evidence. *See Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978) (plurality) (Eighth Amendment requires that sentencer, "in all but the rarest kind of capital case," not be precluded from considering as mitigating factor "any aspect of a

defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"). Capital defendants are also permitted to make their own sentencing recommendations, through testimony or unsworn statements, family members asking for mercy, and argument. *See, e.g., State v. Mundt*, 873 N.E.2d 828, 857 (Ohio 2007) (defendant asked jury in allocution and unsworn statement to spare his life); *State v. Jordan*, ___ S.W.3d ___, 2010 WL 3668513, *20 (Tenn. 2010) (defendant's brother testified he would be devastated if defendant were executed and asked for life without parole sentence); *Jackson v. Epps*, No. 4:03CV461-P, 2010 WL 3853158, *27 (N.D. Miss. Sept. 28, 2010) (counsel asked jury to spare defendant's life). Ott employed all three methods here to ask the jury to impose the most lenient sentence.

As *Payne* recognized, the State must also be permitted to put on adverse evidence of a capital defendant's character to show that execution is the appropriate sentence. *See Payne*, 501 U.S. at 825. Prosecutors do that in a variety of ways, including calling witnesses to detail a defendant's prior conduct to show future dangerousness. *See Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (permissible for sentencer to consider defendant's "past conduct as indicative of his probable future behavior"); *see, e.g., Hawkins v. Wong*, No. Civ. S-96-1155, 2010 WL3516399 (E.D. Cal. Sept. 2, 2010). The prosecution may also call witnesses to opine on a defendant's reputation and character. *See, e.g., Davis v. State*, 315 S.W.3d

908, 915 (Tex. App. 2010) (Texas law permits either party in capital sentencing proceeding to introduce "the prior record of the defendant, his general reputation, his character, an opinion regarding his character"). The prosecution may also call witnesses to detail the circumstances of the charged crimes to show the depravity of a defendant's character. *See Zant*, 462 U.S. at 879.

But while the Constitution places no proscription on the foregoing relevant character evidence generally – indeed, this Court has emphasized its importance – *Booth*'s blanket ban, as read by the Utah Supreme Court, excludes this relevant evidence merely because it happens to come from the defendant's victims.

Arguably, *Booth*'s proscription made some sense as applied to the victim evidence in that case. The surviving members of Booth's victims were not witnesses to the crimes nor were they acquainted with Booth. Thus, they were not in a position to render an opinion on his character or to comment on the circumstances of his crimes. But, unlike the victims' family members in *Booth*, four of the six testifying victims here were eyewitnesses to the charged crimes and had personal knowledge of Ott's volatile and violent character. Three of the six – Ott's wife and two stepdaughters – had lived with him for several years and were intimately familiar with his character. The fourth – Allen Lawrence – having personally endured Ott's harassment and threats for the two months leading up to the crimes, was also familiar with Ott's character. These four witnesses testified to Ott's

on-going aggressive and angry harassment, threats, and abuse and to his horrific acts the night of the murder. Based on their personal interactions with Ott, these witnesses testified that they did not believe he would change. They also testified how Ott's crimes had adversely affected their lives, including making them extremely fearful of what he might do to them if ever released. Granted, Lawrence's characterization of Ott as a remorseless, unfeeling terrorist might arguably be considered inflammatory. But given the admissible evidence the jury had already heard detailing Ott's on-going harassment and horrific crimes, Lawrence's characterization was a fair – and obvious – summation of his own relevant, admissible testimony. Certainly, his characterizations were ones that the prosecution could have legitimately made in argument.

In short, these four witnesses' testimony was directly relevant to Ott's character and, hence, to the sentencing determination. Yet, because these four witnesses were also victims, the Utah Supreme Court read *Booth* as *per se* barring their otherwise relevant and admissible testimony.

Significantly, while the Utah court read *Booth* as prohibiting the victims here from testifying regarding Ott's character and characterizing his crimes against them, the lower court never suggested that Ott's witnesses – who had not personally witnessed the crimes – should have been prohibited from opining on Ott's good qualities, background, and lack of criminal intent. By imposing a blanket ban on this type of

evidence merely because it comes from victims, *Booth* continues to unfairly prevent a capital sentencing jury "from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne*, 502 U.S. at 826. That is the very evil this Court sought to avoid in *Payne* when it overruled *Booth*'s blanket proscription on victim impact evidence.

Booth as applied here and by most other courts also wrongly and unfairly prohibits a victim's surviving family members from ever offering an opinion as to the appropriate sentence, either directly or indirectly. Here, Lacey's mother and sister testified that they hoped Ott never got parole. That testimony – intimately tied to how Ott's crimes had affected them – was clearly admissible under *Payne*. Lacey's sister stated that based on the crimes, she feared what Ott might do if ever released. Lacey's mother testified that she hoped Ott never received parole, so that he might know what it was like "to walk in [her] shoes." Given the horrific nature of Ott's crimes and the damage he inflicted on so many, Lacey's family members' suggestion that he was too dangerous to ever be paroled told the jury nothing they would not have already surmised from the evidence before them. Certainly, such a sentencing recommendation does not constitute cruel and unusual punishment.

More importantly, defendants often either directly or indirectly recommend what they think their sentence should be through allocution, family members, and argument. And Ott fully availed himself of

that opportunity. If a defendant and his family members are permitted to offer an opinion on the appropriate sentence, there is no principled basis for barring victims from also recommending an appropriate sentence, particularly where, as here, the victims personally knew the defendant, suffered harm directly at his hands, and legitimately feared for their safety if he were ever released.

B. The Decision Below Has Deepened an Existing Conflict on Whether the Eighth Amendment Continues to Bar Victims From Offering an Opinion on the Defendant's Character and Sentencing.

The Utah Supreme Court's decision has deepened an already existing and irreconcilable conflict among lower courts on the extent, if any, the Eighth Amendment continues to *per se* bar victims from characterizing or offering opinions on the crime, defendant, and appropriate sentence. On the one hand, most courts, as articulated by the Tenth Circuit, have held that "the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid." *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002) (quoting *Payne*, 501 U.S. at 830 n.2). *See also Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (same). Other courts reaching

the same conclusion include the Eighth Circuit,[1] the Fifth Circuit,[2] and the Fourth Circuit[3] in dictum, and the highest courts of Alabama,[4] Arizona,[5] Maryland,[6] New Jersey,[7] Ohio,[8] Tennessee,[9] Virginia,[10] and Washington,[11] and now Utah.

On the other hand, the Oklahoma Court of Criminal Appeals, that state's criminal court of last resort, has reached the opposite conclusion. *See Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985 (2003); *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App.), *cert. denied*, 525 U.S. 1057 (1998); *Ledbetter v. State*, 933 P.2d 880,

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[1] *See Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000) (dictum).

[2] *See Woods v. Johnson*, 75 F.3d 1017, 1037-38 (5th Cir. 1996) (dictum).

[3] *See Ivey v. Catoe*, 36 Fed. Appx. 718, 725-26 (4th Cir.), *cert. denied*, 123 S.Ct. 420 (2002) (dictum).

[4] *See Ex Parte McWilliams*, 640 So.2d 1015, 1017 (Ala. 1993).

[5] *See Lynn v. Reinstein*, 68 P.3d 412 (Ariz. 2003).

[6] *See Ware v. State*, 759 A.2d 764, 783-86 (Md.), *cert. denied*, 531 U.S. 1115 (2000).

[7] *See State v. Koskovich*, 776 A.2d 144, 177 (N.J. 2001).

[8] *See State v. Fautenberry*, 650 N.E.2d 878, 882 (Ohio), *cert. denied*, 516 U.S. 996 (1995).

[9] *See State v. Middlebrooks*, 995 S.W.2d 550, 558 (Tenn. 1999).

[10] *See Beck v. Commonwealth*, 484 S.E.2d 898, 906 (Va. 1997).

[11] *See State v. Pirtle*, 904 P.2d 245, 269 (Wash. 1995), *cert. denied*, 518 U.S. 1026 (1996).

890-91 (Okla. Crim. App. 1997); *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997). The Oklahoma court noted that although *Payne* declined to address *Booth* "as it related to characterizations and opinions about the crime, the defendant and the appropriate punishment," it was clear from a reading of both *Booth* and *Payne* that "whatever ban against this evidence there may be does not lie in the Eighth Amendment." *Ledbetter*, 933 P.2d at 890. The Oklahoma court reasoned that "since the Eighth Amendment rationale supporting the ban of the . . . victim impact evidence in *Booth* was overruled in *Payne*, this portion was also overruled, insofar as it had its roots in the Eighth Amendment." *Id.* at 890-91. Accordingly, the Oklahoma Court of Criminal Appeals consistently permits victims in capital cases to recommend the appropriate sentence, albeit with some due process limitations. *See Murphy*, 47 P.3d at 885.

This conflict will not be resolved without this Court's intervention. Indeed, the Tenth Circuit, acknowledging the conflict with the Oklahoma Court of Criminal Appeals, has characterized the latter's position as so contrary to clearly established Supreme Court precedent to warrant habeas review. *See Hooper*, 314 F.3d at 1174 ("Although the OCCA concluded the trial court properly admitted this testimony, we agree with Petitioner that the trial court's decision to admit the testimony is contrary to clearly established Supreme Court precedent. *See* 28 U.S.C. 2254(d)(1)."). For its part, the Oklahoma Court of Criminal Appeals has interpreted this

Court's denial of repeated petitions for certiorari presenting the question as implicit approval of its position, *see Murphy*, 47 P.3d at 885, and rejected any "contention that our interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Id.*

II. The Utah Supreme Court's Decision to Apply *Booth* in a Non-Death Sentencing Proceeding is Directly Contrary to *Booth* and the Clear Majority of Jurisdictions.

Booth, by its express terms, applies only to the "decision to impose the death sentence." *Booth*, 482 U.S. at 508. This Court noted in *Booth* that its "disapproval of victim impact statements at the sentencing phase of a capital case does not mean . . . that this type of information will never be relevant in any context." *Id.* at 507 n.10. Indeed, the Court noted that at least 36 states and Congress had provided for some form of victim participation in the criminal justice system and that its decision in *Booth* should not be read to imply any "opinion as to the use of [victim impact] statements in noncapital cases." *Id.* at 509 n.12.

The crux of the Court's reasoning was based on its holdings over the prior decade regarding what factors a jury might constitutionally consider in deciding whether to impose the death penalty. *See Booth*, 482 U.S. at 502-05 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976); *Zant v. Stephens*, 462 U.S. 862 (1983); *Eddings v. Oklahoma*, 455 U.S. 104 (1982);

Enmund v. Florida, 458 U.S. 782 (1982); *Woodson v. North Carolina*, 428 U.S. 280 (1976)). Thus, this Court explained, its decision was "guided by the fact death is a 'punishment different from all other sanctions,' and that therefore the considerations that inform the sentencing decision may be different from those that might be relevant to other liability or punishment determinations." *Booth*, 482 U.S. at 509 n.12 (citations omitted).

Despite *Booth*'s express limitation of its holding to death penalty cases, the Utah Supreme Court applied *Booth* to a sentencing proceeding in which death was not an option. This was contrary not only to *Booth*, but to the overwhelming authorities that have held that *Booth* does not apply in non-death penalty cases.[12] Petitioner has found only two other courts that have applied *Booth*'s Eighth Amendment analysis to exclude victim evidence in a non-death

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[12] *See, e.g., United States v. Horsfall*, 552 F.3d 1275, 1284 (11th Cir. 2008), *cert. denied*, 129 S.Ct. 2034 (2009); *Hatcher v. Duckworth*, 917 F.2d 1306 (7th Cir. 1990) (unpublished); *United States v. Santana*, 908 F.2d 506, 507 (9th Cir. 1990); *Disotell v. Warden La. Corr. Inst. for Women*, 2010 WL 2483420, *6, (W.D. La. 2010) (slip copy); *Razo v. Blair*, No. 08-1106-PHX-NVW, 2010 WL 1433487, *15 (D. Ariz. Feb. 11, 2010) (slip copy); *Mahan v. Cate*, No. CV08-04699 ABC, 2009 WL 3244911, *2 (C.D. Calif. Oct. 2, 2009) (unreported); *Cooey v. Anderson*, 988 F. Supp. 1066 (N.D. Ohio 1997); *State v. Searcy*, 798 P.2d 914, 919 (Idaho 1990); *People v. Ratzke*, 625 N.E.2d 1004, 1017 (Ill. 1993); *Kills on Top v. State*, 15 P.3d 422, 437 (Mont. 2000); *Randell v. State*, 846 P.2d 278, 280 (Nev. 1993); *State v. Tyler*, 565 S.E.2d 368, 377 n.11 (W. Va. 2002).

case. *See State v. Harwell*, 102 Ohio St. 3d 128, 807 N.E.2d 330 (2004) (in case of juvenile murderer who was not eligible for death penalty, all capital sentencing protections applied, including proscription on victim impact statements); *State v. Gideon*, 257 Kan. 591, 894 P.2d 850 (1995) (in non-death sentencing proceeding, suggesting in dicta that victim's sentencing recommendation would have been improper if presented to a jury).

Thus, the highest courts in Utah, Ohio, and Kansas have mistakenly read *Booth* to reach much farther than it actually does. That reading conflicts not only with *Booth*'s express holding, but also with its core reasoning. This Court should grant certiorari review to correct that growing misapprehension.

III. Both Questions Presented Are of National Importance.

Both questions presented are a matter of national significance. Forty-eight states, including Utah, grant victims the right – by constitution, statute, or both – to make a statement at sentencing.[13] Twenty-three of

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[13] *See* Ala. Const. art. I, § 6.01(a); Ala. Code § 15-23-74; Alaska Const. art. I, § 24; Alaska Stat. § 12.61.010(a)(9); Ariz. Const. art. II, § 2.1(A)(4); Ariz. Rev. Stat. Ann. § 13-4426(A); Ark. Code. Ann. § 16-90-1112(a)(1); Calif. Const. art. I, § 28(b)(8); Calif. Penal Code Ann. § 1191.1; Colo. Const. art. II, § 16a; Colo. Rev. Stat. Ann. § 24-4.1-302.5(d); Conn. Const. art. I, § 8(b)(8); Conn. Gen. Stat. Ann. § 53a-39(d); Del. Code Ann. tit. 11, § 9415; Fla. Const. art. I, § 16(b); Fla. Stat. Ann. § 921.143; Ga. Code

(Continued on following page)

Ann. § 17-10-1.1; Idaho Const. art. I, § 22(6); Idaho Code Ann. § 19-5306(1); Ill. Const. art. I, § 8.1; 725 Ill. Comp. Stat. 120/4(a); Ind. Const. art. I, § 13(b); Ind. Code Ann. §§ 35-40-5-5 & 35-40-5-6(a); Iowa Code Ann. § 915.21; Kan. Const. art. 15(a); Kan. Stat. Ann. § 22-3424(e); Ky. Rev. Stat. Ann. § 421.520; La. Const. art. 1, § 25; La. Rev. Stat. Ann. § 46:1844; Me. Rev. Stat. Ann. tit. 17-A § 1174; Md. Const. Declaration of Rights, art. 47(b); Md. Code. Ann. § 11-402; Mass. Gen. Laws ch. 279, § 4B; Mich. Const. art. I, § 24(1); Mich. Comp. Laws Ann. § 780.763 to 765; Minn. Stat. Ann. § 611A.038(a)(3); Miss. Const. § 26-A; Miss. Code Ann. § 99-43-31 & -33; Mo. Const. art. I, § 32.1(2); Mo. Rev. Stat. § 557; Mont. Code Ann. § 46-18-115(4)(a); Neb. Const. art. I, § 28(1); Neb. Rev. Stat. § 81-1848; Nev. Const. art. I, § 8(2); Nev. Rev. Stat. § 176.015(3); N.H. Rev. Stat. Ann. § 21-M-k(II)(p) & § 651:4-a; N.J. Const. art. I, § 22; N.J. Stat. Ann. § 2C:44-6(3); N.M. Const. art. 2, § 24(A)(7); N.M. Stat. Ann. § 31-26-4; N.Y. Crim. Proc. Law § 380.50(2)(b); N.C. Const. art. I, § 37; N.C. Gen. Stat. Ann. § 15A-833(a); N.D. Cent. Code Ann. § 12.1-34-02(14); Ohio Const. art. I, § 10a; Ohio Rev. Code Ann. § 2930.13-14; Okla. Const. art. II, § 34(A); Okla. Stat. Ann. tit. 21 § 142A-1; Or. Const. art. I, § 42(1)(a); Or. Rev. Stat. § 137.013 & 163.150(1)(a); 18 Pa. Cons. Stat. Ann. § 11.201(5); R.I. Const. art. I, § 23; R.I. Gen. Laws Ann. § 12-28-3 to -4; S.C. Const. art. I, § 24(A)(5); S.C. Code Ann § 16-3-1535(B)(6) (2009); S.D. Codified Laws § 24-15A-43(8); Tenn. Const. art. I, § 35(4); Tenn. Code Ann. § 40-38-202 to -203; Texas Const. art. I, § 30(b); Texas Code Crim. Proc. Ann. art. 56.02; Utah Const. art. I, § 28(1)(b); Utah Code Ann. § 77-38-4(1)(b); Vt. Stat. Ann. tit. 13, § 5321(a)(2); Va. Const. art. I, § 8-A; Va. Code Ann. § 19.2-11.01(4)(a) & § 19.2-299-.1; Wash. Const. art. I, § 35; Wash. Rev. Code Ann. § 7.69.030(14); W. Va. Code Ann. § 61-11A-2(b); Wyo. Stat. Ann. § 1-40-203(b)(ix) & (xviii) & § 7-21-102(c). *See also* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 Cornell L. Rev. 282, 286-87 (2003) ("The constitutions of forty States either explicitly or implicitly grant victims the right to give recommendations at sentencing. Twenty-three of these States grant victims the constitutional right to address the sentencing authority. Seventeen States do not have the right in their constitutions but grant the right by statute.").

those states have statutes expressly granting victims the right to be heard at sentencing proceedings regarding the defendant's character, crime, and/or recommended sentence.[14] Of those states, at least two – Arizona and New Hampshire – expressly permit victims to make such statements in death penalty sentencing proceedings.[15] The enactment of Arizona's provision, however, is conditional and takes place only if on or before June 30, 2013, this Court or the Arizona Supreme Court holds that it is constitutionally permissible for a victim in a capital case to make a sentencing recommendation. *See* Ariz. Rev. Stat. Ann. § 13-701.01.

The Utah Supreme Court has now squarely held that the Eighth Amendment, without exception, bars victims from offering an opinion on the crime, defendant's character, and sentence, even when those opinions are relevant, and even when death is not a sentencing option. That decision – along with those in Ohio and Kansas – casts constitutional doubt on the laws and constitutions of all those States that afford victims the right to participate in non-capital sentencing proceedings. As noted, nearly half the States

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[14] Those States are Alabama, Arizona (conditional enactment), Arkansas, California, Connecticut, Florida, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, New Hampshire, New York, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Tennessee, Vermont, and Wyoming.

[15] *See* Ariz. Rev. Stat. Ann. § 13-4426; N.H. Rev. Stat. Ann. § 651:4-a.

allow victims to comment on the crime, defendant's character, and/or recommend a sentence in non-death cases. Applying *Booth* to all sentencing proceedings would be disruptive to the long-standing and widespread practice of allowing victims to address these matters at sentencing.

Because *Booth* and *Payne* are at the center of the controversy, only this Court can answer the questions presented. It should do so by holding that the Eighth Amendment erects no *per se* bar against victim statements about the defendant's character and the appropriate sentence. There is no reason to treat this evidence any differently than other relevant evidence in both capital and non-capital sentencing proceedings. Any risk that such evidence would be unduly prejudicial in a given case may be addressed by applicable evidentiary rules or by the Due Process Clause, should a "witness' testimony . . . so infect[ ] the sentencing proceeding as to render it fundamentally unfair." *Payne*, 501 U.S. at 827.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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This opinion is subject to revision before final publication in the Pacific Reporter.

IN THE SUPREME COURT
OF THE STATE OF UTAH

State of Utah,

Plaintiff and Appellee,

v.

Mark Anthony Ott,

Defendant and Appellant.

No. 20040638.

FILED

Jan. 5, 2010.

Second District, Farmington
The Honorable Michael G. Allphin
No. 021701485

Attorneys: Mark L. Shurtleff, Att'y Gen., Laura B. DuPaix, Asst. Att'y Gen., Salt Lake City, for plaintiff Elizabeth Hunt, Salt Lake City, for defendant.

NEHRING, Justice:

INTRODUCTION

¶1 This case comes to us on direct appeal from Mark Ott's sentencing for aggravated murder and other charges. On one horrific night in the summer of 2002, Mr. Ott broke into the home of his wife, Donna Ott, who had recently filed for divorce. Knife in hand,

Mr. Ott attacked Mrs. Ott's boyfriend, Allen Lawrence. He also stabbed his stepdaughter, Sarah Gooch. Mr. Ott then set the house on fire. All of the residents of the house escaped except Lacey Lawrence, Mr. Lawrence's six-year-old daughter, who died in the fire. Mr. Ott eventually entered an *Alford* plea of guilty to aggravated murder in connection with Lacey's death and pled guilty to other charges. He was sentenced by a jury to life in prison without the possibility of parole. In Mr. Ott's direct appeal, he argues over the legality of his plea as well as various instances of ineffective assistance. We hold that Mr. Ott's counsel provided ineffective assistance because counsel failed to object to portions of the victim impact evidence.

BACKGROUND

¶2 Mr. Ott married Donna Ott in 1996. Mrs. Ott had three children from a previous marriage (Daniel, Sarah, and Lucy), and had two more after her marriage to Mr. Ott (Carissa and William). Over the years, marital and family problems increased, and Mrs. Ott eventually separated from Mr. Ott and filed for divorce. A month after their separation, Mrs. Ott met Allen Lawrence and they began to date. Mr. Ott disapproved of Mrs. Ott's relationship with Mr. Lawrence and verbally and physically threatened the two of them on several occasions.

¶3 On the night of the fire, Mrs. Ott was awakened by her dogs barking. She went to the window to

check on them and saw Mr. Ott in the backyard. She then ran to Mr. Lawrence, who was asleep in her bed, and attempted to wake him. Meanwhile, Mr. Ott broke into the house, entered Mrs. Ott's bedroom, and began to stab Mr. Lawrence. Mrs. Ott's daughter, Sarah, attempted to stop Mr. Ott from stabbing Mr. Lawrence by jumping on Mr. Ott's back and hitting his head with a can of mace. Mr. Ott then stabbed Sarah in her abdomen. During the attack, Mrs. Ott attempted to call the police but was unsuccessful because the phone line had been cut.

¶4 Despite his wounds, Mr. Lawrence was able to escape the bedroom and make his way to the front door. Mr. Ott followed Mr. Lawrence and continued to stab him. At some point, the knife broke and Mr. Ott was distracted by Mrs. Ott who had been watching the attack from the hallway. Mr. Ott said to Mrs. Ott, "Now look what you've made me do. Are you happy now?" He then approached Mrs. Ott and embraced her from behind. At that point, Lucy came upstairs from her bedroom in the basement, saw Mr. Ott, screamed, and ran back downstairs. Then, either while Mr. Ott held Mrs. Ott or shortly after, Sarah came from the bedroom and helped Mr. Lawrence out the front door. Sarah and Mr. Lawrence ran down the street and hid behind a fence.

¶5 Meanwhile, Mr. Ott went out the back door. Mr. Ott re-entered the home and poured gasoline, which he had obtained from the garage, on Mrs. Ott's bed. Mr. Ott then went downstairs, lit a sofa and a loveseat on fire, and told Mrs. Ott to get everyone out

of the house. Seeing the fire, Mrs. Ott yelled for her daughter, Lucy, and Lucy's friend, Hillary, who was spending the night. She found the girls in the basement, and they safely exited the house. Mrs. Ott confirmed that her children were safely out of the house by conducting a head count, but she forgot to confirm the whereabouts of Lacey.[1] Lacey was Mr. Lawrence's six-year-old daughter, and she was spending the night in Carissa's room on the main floor of the house. Mrs. Ott then observed Mr. Ott leaving the scene in her vehicle.

¶6 Just as Mr. Ott drove away, Mrs. Ott remembered that Lacey was still in the house. She ran back to the burning house and attempted to enter it, but was prevented from doing so by a police officer. Firefighters found Lacey inside a bedroom, dead from carbon monoxide poisoning.

¶7 Mr. Ott was charged with aggravated murder as a capital felony. The State also charged him with aggravated arson, aggravated burglary, aggravated assault, theft, attempted aggravated murder, and violation of a protective order. Mr. Ott maintained that he never knew Lacey was in the house, though he admitted starting the fire that killed her. Mr. Ott moved to quash his bindover on the charge of aggravated murder. He argued that he could not have intentionally and knowingly killed Lacey because he

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[1] Daniel had moved out of the house, and William and Carissa were spending the night at Mr. Ott's home.

did not know she was in the house. Mr. Ott further argued that his intent to kill Mr. Lawrence with a knife was different from his intent to burn the house down.

¶8 The State argued that transferred intent and concurrent intent, also known as the "kill zone" theory, sufficed to sustain charges of aggravated murder. The district court rejected as too tenuous the State's theory that Mr. Ott's intent to kill Mr. Lawrence could be transferred and treated as the intent to kill Lacey. Nevertheless, the district court held that the magistrate, in ordering the bindover, had implicitly found that Mr. Ott harbored an intent to kill Mrs. Ott in the fire and that this intent transferred to Lacey.

¶9 Mr. Ott petitioned unsuccessfully for interlocutory review of the district court's order. A plea bargain was arranged, and Mr. Ott entered an *Alford* plea[2] to the aggravated murder charge and guilty

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[2] By entering an *Alford* plea, a defendant does not admit guilt. Rather, the defendant enters a guilty plea because he recognizes that a prosecutor has enough evidence to obtain a guilty verdict. In *North Carolina v. Alford,* Mr. Alford argued that he was innocent of the murder charge but pled guilty to second degree murder in an attempt to avoid the threat of a sentence of death for first degree murder. 400 U.S. 25, 28 (1970). The United States Supreme Court stated that "while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty." *Id.* at 37. The Court went on to hold that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a

(Continued on following page)

pleas to the other charges in exchange for the State's agreement not to pursue the death penalty in his capital sentencing hearing and to drop several charges.

¶10 At the capital sentencing hearing, the jurors heard testimony from various individuals. Ten of the twelve jurors voted to sentence Mr. Ott to life in prison without the possibility of parole. The district court then imposed the statutory prison terms for each of the other charges and ordered them to run consecutively to each other and to the life without parole sentence.

¶11 Mr. Ott's case next came to us on direct appeal where the central issue was Mr. Ott's claim that his attorneys were ineffective. We ordered that the case be temporarily remanded to the district court for discovery pursuant to rule 23B of the Utah Rules of Appellate Procedure. At the conclusion of the hearings, the district court entered findings that no conflict of interest existed and that Mr. Ott's counsel was not ineffective. The record was returned to us for final action on Mr. Ott's direct appeal.

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prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* The Court concluded that this type of plea would be appropriate when "a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Id.*

¶12 After hearing oral arguments and reviewing the parties' briefs and the record, we asked for supplemental briefing on the issue of whether Mr. Ott's *Alford* plea to aggravated murder could satisfy the elements of Utah Code section 76-5-202 (2008). We were concerned that Mr. Ott's *Alford* plea was defective as a matter of law because of the statutory requirement that to be guilty of aggravated murder a defendant must knowingly and intentionally kill the victim.

¶13 This appeal will address (1) whether Mr. Ott's plea was defective as a matter of law and (2) whether Mr. Ott's representation constitutes ineffective assistance of counsel. Because we hold that Mr. Ott's counsel was objectively deficient for failing to object to portions of the victim impact evidence introduced by the prosecution, and that this failure prejudiced Mr. Ott, we do not address the rest of Mr. Ott's ineffective assistance claims. *See State v. Carter,* 776 P.2d 886, 889 (Utah 1989) (overruled on other grounds) (noting court's ability "to expeditiously focus judicial resources and energy on those critical or outcome-determinative issues which may be raised in any given case and/or which have not in substance been previously urged upon this Court and rejected"). We have jurisdiction over this appeal pursuant to Utah Code section 78A-3-102(3)(j) (2008).

STANDARD OF REVIEW

¶14 We will address the following two issues on appeal: (1) whether Mr. Ott's guilty plea was proper and (2) whether Mr. Ott's counsel was ineffective.

¶15 First, attempts to withdraw a guilty plea invite multiple standards of review. *State v. Beckstead,* 2006 UT 42, ¶ 7, 140 P.3d 1288. As an initial matter, we note "an attempt to withdraw a guilty plea on appeal must be preceded by a motion before the district court." *State v. Rhinehart,* 2007 UT 61, ¶ 2, 167 P.3d 1046.

¶16 Second, some of Mr. Ott's claims of ineffective assistance of counsel are raised for the first time on appeal and some have been addressed by the trial court in the 23B hearing, both categories bearing different standards of review. Mr. Ott's ineffective assistance claim relating to counsels' failure to object to the victim impact evidence was not a part of his 23B hearing. Because we decide this case on a claim of ineffective assistance of counsel that is presented for the first time on appeal, we need only describe one appropriate standard of review. "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark,* 2004 UT 25, ¶ 6, 89 P.3d 162.

ANALYSIS

I. THIS COURT LACKS JURISDICTION TO ADDRESS MR. OTT'S GUILTY PLEA BECAUSE MR. OTT FAILED TO MOVE THE COURT TO WITHDRAW HIS PLEA

¶17 Utah Code section 77-13-6 (2008) governs the withdrawal of guilty pleas, including the *Alford* plea in Mr. Ott's case. Section 77-13-6 states:

> (1) A plea of not guilty may be withdrawn at any time prior to conviction.
>
> (2)(a) A plea of guilty or no contest may be withdrawn only upon leave of the court and a showing that it was not knowingly and voluntarily made.
>
> (b) A request to withdraw a plea of guilty or no contest, except for a plea held in abeyance, shall be made by motion before sentence is announced. Sentence may not be announced unless the motion is denied. For a plea held in abeyance, a motion to withdraw the plea shall be made within 30 days of pleading guilty or no contest.
>
> (c) Any challenge to a guilty plea not made within the time period specified in Subsection (2)(b) shall be pursued under Title 78B, Chapter 9, Post-Conviction Remedies Act, and Rule 65C, Utah Rules of Civil Procedure.

¶18 We have previously held that failure to withdraw a guilty plea within the time frame dictated by section 77-13-6 deprives the trial court and

appellate courts of jurisdiction to review the validity of the plea. *State v. Rhinehart*, 2007 UT 61, ¶¶ 12-14, 167 P.3d 1046; *see also Grimmett v. State*, 2007 UT 11, ¶ 8, 152 P.3d 306 ("Utah Code section 77-13-6(2)(b) establishes the filing limitations that govern a criminal defendant's right to withdraw a guilty plea. These filing limitations are jurisdictional.") "Section 77-13-6(2)(b) 'imposes a jurisdictional bar on late-filed motions to withdraw guilty pleas,' and failure to comply with its requirements 'extinguishes a defendant's right to challenge the validity of the guilty plea on appeal.'" *Grimmett*, 2007 UT 11, ¶ 8 (internal quotation marks and citations omitted); *State v. Merrill*, 2005 UT 34, ¶¶ 13-20, 114 P.3d 585 (addressing jurisdictional nature of section 77-13-6(2)(b) prior to significant 2003 amendment). In *Rhinehart*, we further held that a defendant may not overcome a failure to timely withdraw his guilty plea even if the failure is "styled as a claim of ineffective assistance of counsel." 2007 UT 61.

¶19 Mr. Ott did not move to withdraw his guilty plea within the time restrictions of section 77-13-6. He argues that this court should disregard his failure to timely move to withdraw his guilty plea because his guilty plea constitutes a misplea. We stated in *State v. Kay* that a misplea may be granted

> where obvious reversible error has been committed in connection with the terms or the acceptance of the plea agreement and no undue prejudice to the defendant is apparent[,]. . . . in situations where some fraud or

> deception by one party leads to the acceptance of the plea agreement[,]. . . . [and] other circumstances where the balancing of the interests and legitimate expectations of the defendant and the public.

717 P.2d 1294, 1305 (Utah 1986), *overruled on other grounds by State v. Hoff*, 814 P.2d 1119, 1123 (Utah 1991). Obvious reversible error occurs when manifest necessity is present. *Id.* at 1303.

¶20 We decline to discuss whether Mr. Ott's plea met the requirements for a court to grant a misplea because we hold that the misplea doctrine in Mr. Ott's case cannot be used to circumvent jurisdictional requirements. Furthermore, neither the State nor Mr. Ott made any motion to the trial court that a misplea occurred, a factor which is considered in cases that have granted a misplea. *See Id.* at 1296-97; *State v. Lopez*, 2005 UT App 496, ¶¶ 2-8, 14-27, 128 P.3d 1; *State v. Bernert*, 2004 UT App 321, ¶¶ 2-5, 7-12, 100 P.3d 221; *State v. Horrocks*, 2001 UT App 4, ¶¶ 2-7, 12-32, 17 P.3d 1145; *State v. Moss*, 921 P.2d 1021, 1022-27 (Utah Ct. App. 1996). The Utah Court of Appeals has recognized that a trial court may sua sponte set aside a guilty plea even after the time restrictions of section 77-13-6 have expired. *Lopez*, 2005 UT App 496, ¶ 19. In this case, however, the trial court never exercised this discretion. Moreover, unlike the circumstance here, sentencing had not yet occurred in *Lopez*. We therefore do not have jurisdiction to determine the validity of Mr. Ott's guilty plea.

II. MR. OTT'S COUNSEL WAS INEFFECTIVE BECAUSE HE FAILED TO OBJECT TO VICTIM IMPACT EVIDENCE, THEREBY PREJUDICING MR. OTT

¶21 Mr. Ott argues his trial counsel was ineffective because counsel failed to object to the admission of certain victim impact evidence during his capital sentencing hearing. Specifically, counsel did not challenge the admissibility of a six-minute videotape featuring pictures of Lacey Lawrence set to moving music, testimony from Lacey's family members about the devastating effect Lacey's death had on them, and testimony from Lacey's family on their opinion of Mr. Ott's character and the appropriate sentence.

¶22 "An ineffective assistance of counsel claim raised for the first time on appeal presents a question of law." *State v. Clark*, 2004 UT 25, ¶ 6, 89 P.3d 162. "To prove ineffective assistance of counsel, defendant must show: (1) that counsel's performance was objectively deficient and (2) a reasonable probability exists that but for the deficient conduct defendant would have obtained a more favorable outcome at trial." *Id.* "To satisfy the first part of the test, defendant must overcome the 'strong presumption that [his] trial counsel rendered adequate assistance.'" *Id.* (quoting *State v. Crosby*, 927 P.2d 638, 644 (Utah 1996)) (alterations in original).

¶23 In *State v. Carter*, we questioned whether victim impact evidence concerning a defendant's blameworthiness was probative and held that victim

impact evidence was inadmissible in capital sentencing. 888 P.2d 629, 652-53 (Utah 1995), *superseded by statute,* Utah Code Ann. § 76-3-207(2)(a)(iii) (1995) ("This censure of victim impact evidence in capital cases applies to evidence of the victim's character, evidence of the effects of the crime on the surviving members of the family, and evidence of the surviving members' opinions of the crime."). In 1995, the Legislature amended section 76-3-207 to expressly allow evidence pertaining to "the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims," in capital sentencing proceedings. Utah Code Ann. § 76-3-207(2)(a)(iii) (2008).

¶24 Mr. Ott argues that regardless of the amendment to section 76-3-207, his trial counsel should have argued that the victim impact evidence presented by the State in his sentencing proceeding was not admissible either because (1) section 76-3-207(2)(a)(iii) is unconstitutional under the Utah Constitution, or (2) that under *Carter* the evidence is inadmissible because it is not probative. Mr. Ott also contends that his counsel provided ineffective assistance for failing to object to portions of the victim impact evidence that spoke to Mr. Ott's character, chances for his rehabilitation, and the appropriate penalty to be imposed; all of which he insists violated the United States Constitution. We do not address Mr. Ott's first two arguments today because we hold that portions of the impact evidence the State introduced at Mr. Ott's sentencing hearing violated the

Eighth Amendment of the United States Constitution, and that Mr. Ott's counsels' failure to object to this evidence constitutes ineffective assistance of counsel.[3]

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[3] Mr. Ott has cited various provisions of the Utah Constitution as possibly standing for the proposition that Utah Code section 76-3-207(2)(a)(iii) is unconstitutional. In the past we have declined to address the constitutionality of section 76-3-207(2)(a)(iii) because either the issue had not been briefed or admission of the victim impact evidence constituted harmless error. *See State v. Arguelles*, 2003 UT 1, ¶ 123 n.26, 63 P.3d 731; *State v. Honie*, 2002 UT 4, ¶ 61 n.7, 57 P.3d 977; *State v. Kell*, 2002 UT 106, ¶¶ 52-54, 61 P.3d 1019. In Mr. Ott's case, we decline to address the constitutionality of section 76-3-207(2)(a)(iii). We also do not address whether Mr. Ott's counsel was objectively deficient for failing to object to the "Meet Lacey Lawrence" video. This court follows the primacy approach and "looks first to state constitutional law, develops independent doctrine and precedent, and decides federal questions only when state law is not dispositive." *West v. Thomson Newspapers*, 872 P.2d 999, 1006 (Utah 1994) (internal quotation marks omitted). We do not address the state constitutional issues briefed by Mr. Ott because doing so may require us to find section 76-3-207(2)(a)(iii) unconstitutional. Avoiding such an outcome is an adequate reason to stray from the primacy approach in this case. *See State v. Briggs*, 2008 UT 83, ¶ 26, 199 P.3d 935 ("[I]f the challenged state action violates the federal Constitution, we need not reach the question of whether the Utah Constitution provides additional protection; we may instead resolve the case with reference only to the federal Constitution.")

A. Mr. Ott's Counsel Was Objectively Deficient Because They Failed to Object or to Attempt to Otherwise Exclude Portions of the Victim Impact Evidence

¶25 "To establish a claim of ineffectiveness based on an oversight or misreading of law, a defendant bears the burden of demonstrating why, on the basis of the law in effect at the time of trial, his or her trial counsel's performance was deficient." *State v. Dunn,* 850 P.2d 1201, 1228 (Utah 1993). In *Payne v. Tennessee,* the United States Supreme Court held that the Eighth Amendment does not bar, per se, victim impact evidence, but victim impact evidence may be inadmissible if the evidence is so prejudicial that it makes sentencing fundamentally unfair under the Due Process Clause. 501 U.S. 808, 823, 827 (1991); *see also Darden v. Wainwright,* 477 U.S. 168, 181 (1986) ("The relevant question is whether the prosecutors' comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" (quoting *Donnelly v. DeChristoforo,* 416 U.S. 637, 643 (1974)). *Payne* overturned *Booth v. Maryland,* which held the Eighth Amendment barred victim impact evidence. *Payne,* 501 U.S. at 830. However, to the extent *Payne* overruled *Booth, Booth* retained viability for its holding that victim impact evidence that addresses the defendant's character or expresses the victim's opinion of the appropriate sentence at the penalty phase of trial is inadmissible under the Eighth Amendment. *Id.* at 830, n.2 (stating, *Payne* is limited to holding "that evidence and argument relating to the victim

and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing"); *see also id.* at 833 (O'Connor, J. concurring) (stating, "we do not reach this issue as no evidence of this kind was introduced at petitioner's trial"); *United States v. McVeigh*, 153 F.3d 1166, 1217 (10th Cir. 1998) (stating, "*Payne* did not overrule the prohibitions in *Booth* against the admission of 'information concerning a victim's family members' characterization of and opinions about the crime, the defendant, and the appropriate sentence.'" (quoting *Payne*, 501 U.S. at 835 n.1 (Souter, J., concurring))).

¶26 We hold that large portions of the victim impact evidence introduced at Mr. Ott's capital sentencing hearing featured the victims' opinions of the defendant's character or the appropriate sentence and were therefore clearly at odds with United States Supreme Court precedent. Each victim was asked to testify about how he or she would feel if Mr. Ott were to be released in twenty years. Each expressed the opinion that Mr. Ott could not be rehabilitated and the notion that he might ever be released frightened them. We recount the relevant testimony below. In order to provide context for the statements made, we have quoted large portions of the testimony given at Mr. Ott's sentencing hearing. Although this testimony contains many impermissible statements, we are not suggesting that every statement quoted below is constitutionally inadmissible.

¶ 27 Allen Lawrence, Lacey's father, testified as follows:

> Q. In giving you an opportunity at this point to express your thoughts and feelings to the jury about what you think they ought to consider in imposing sentence on Mr. Ott, what would you say?
>
> A. Well, I think they need to take what kind of guy this person is into consideration. I mean, he's shown his hand. He's shown what he truly is, the kind of man he is . . . these types of crimes are committed by certain types of people and he just happens to be one of them. They are psychopathic in nature. They have no feelings for other people. They have no respect for other people's rights. No respect for other people's pursuit of happiness. No respect for other people's feelings. They can kill and they don't have any more feeling for killing someone than if they reached up and picked an apple off of a tree. They don't feel it. That's the kind of guy this is. I don't think he'll ever change. I don't think he should ever have the opportunity to again perpetrate his violent nature on any human being anywhere again ever. He doesn't deserve it. He's used up all his chances. He's shown who he is and what he does when he does not get his way. He's shown us. He showed his hand. That's what he is. That's is [sic] the defining moment of that man's life. That five minute episode defined him as what he is. That's what Mr. Ott is. That's him.

Q. Based upon your personal experiences with Mr. Ott . . . and what you observed and perceived in the manner and fashion in which he carried out the attack on you on Hawthorne Drive, is it your perception that if he had known Lacey was in that house would he have escorted her out before setting that house on fire?

A. I don't think he would have done a damn thing different. This man is a terrorist. He deals with anarchist cookbooks. He looks at how bombs are built. When he set that house on fire this isn't like building a campfire with a grocery sack. This is a bomb. If I dumped gallons of gasoline on this floor right here and lit it with a match, can you imagine how explosive that would be? It goes up instantly. I've thrown little bits of gas on a campfire to start one. It flares up instantly. Can you imagine that much gasoline in the house? . . . He didn't care. This guy does not care about other people's feelings. He has no empathy for anybody, none. He doesn't have it. It's not inside of his character to have that.

¶28 Donna Ott testified as follows:

Q. Assuming that Mr. Ott was given a sentence of life with possibility of parole, do you have any concerns about him getting out of prison?

A. I think I should. As a matter of fact, I do.

Q. Okay. What is that concern?

A. I know a lot of very healthy 60-year-old men. I don't see that things will change much in 20 years. I believe that he'll come out and he will look for us. Knock. Knock. Exactly right.

Q. So do you feel like he'd do this to you again?

A. Exactly. Yes. Yes.

Q. You said that you don't see him changing. What is that based on?

A. The control freak. They don't know – if they don't get what they want, they don't know any other way but to threaten. It's a lifestyle. He doesn't know how to deal – it's how he lives his life.

¶29 Sarah Gooch, Donna Ott's daughter, responded to a similar line of questioning as follows:

Q. Based upon your – your knowledge having lived with Mark Ott for those years, experienced life in the home with Mark Ott, and experienced the attack on September 1st of 2002 by Mark Ott, what if any concerns do you have if Mark Ott is ever released from prison?

A. I have a hard enough time sleeping as it is. It's a long time for somebody to stir about how pissed off they are.

Q. What about his ability to change in prison based upon what you know of him?

A. Mark's been like – his whole life, ever since I've known him. How is he gonna change?

Q. How will that impact you personally, do you believe, if he's ever released from the Utah State Prison?

A. I don't know. I – I don't know. I'm terrified now. I'd hate to see how scared I'd be if he was actually out.

¶30 Lucy Gooch testified:

Q. After the event of that night, what you've done, what you've gone through since, do you have any – are you fearful of the defendant?

A. Very much so.

Q. And do you have any fear if he would be released from prison in 20 years or what he might do?

A. I think that if we let him out, it doesn't matter how old he's going to be, I think that, you know, he'll finish what he went there to do. I honest to God I [sic] feel that way.

¶31 Amber Lawrence, Lacey's sister, testified as follows:

Q. Amber, knowing what happened in the home on September 1st of 2002, in the Out [sic] Home, and what happened to your little sister, what are your thoughts and feelings on how it would make you feel knowing

that the man that did this to your father and sister might have the possibility of being released from prison in 20-plus years.

A. Terrifies me. I don't think that it – he wouldn't – he wouldn't change. He wouldn't change at all. And I didn't – I came here not knowing about not even a portion of the things that have went on in the jail, things that he had done. But I mean, it scares me enough just sitting in this courtroom with him knowing he has no handcuffs on. That scares me enough. And I don't even want to think about how it would be knowing he was going to get out in any amount of time. I don't see how anybody could do what he did. But he did that today. And I know that if it was up to him, my dad wouldn't be sitting here today. My dad would not be here at all . . . But it could have very well been me instead of my little sister, or both of us.

Q. Amber, is there anything else you want this jury to know? Any other thoughts or feelings you have you want to make sure they are –

A. I want them to know that Mark does not care. He doesn't care what happened that night. He doesn't care if it was me or my sister or everybody in that house. He burned it down. He didn't help anybody out of it. He didn't try to pick out one person out of five. He wanted just for us, my dad. He was there for whoever and whatever was in that house. I mean, the house could have caught on fire

> to the next door neighbors. He didn't care who died. He didn't care who got hurt. I know his intention was to kill my dad, but instead he killed my little sister. And I don't think he deserves anything more than what she got. She can't be here today to say what she thinks. I don't think that he deserves any rights. He shouldn't have any rights. He took all of hers away from her, and I don't believe that he should have any.

¶32 Terry Cook, Lacey Lawrence's mother, testified as follows:

> Q. . . . Do you have any feelings that you would like to express as they relate to the defendant and what should happen to the defendant?
>
> A. Yeah. I think he should have to walk in my shoes. I think you should have to walk in my shoes 'cause my last two years have been horrible. You know what? They are not going to get better. I loved my daughter. The love I had for my daughter was so strong. You can't take that away . . . and I hate to say this, but I hope you don't get out on parole because you don't deserve it. My daughter don't get to come back to me right now. I didn't get to finish with my daughter's life. I have to go home tonight without my daughter there, and I have to be alone for the rest of my life and be unhappy for the rest of my life. I hope you can think about that for the rest of your life.

¶33 It is clear to us that the testimony offered at Mr. Ott's sentencing falls squarely within the categories of evidence identified as inadmissible, in capital sentencing hearings, by *Payne* and *Booth*. Mr. Ott's counsel was objectively deficient for failing to object to the offensive evidence.

¶34 The State argues, however, that Mr. Ott's counsel deliberately chose not to object to the inadmissible evidence as part of trial strategy. We find this argument to be without merit. "Proving that his counsel's performance fell below an objective standard of reasonableness requires [Mr. Ott] to 'rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy.'" *Taylor v. State*, 2007 UT 12, ¶ 73, 156 P.3d 739 (quoting *Carter v. Galetka*, 2001 UT 96, ¶ 40, 44 P.3d 626). We "'will not review counsel's tactical decisions simply because another lawyer, e.g., appellate counsel, would have taken a different course.'" *Parsons v. Barnes*, 871 P.2d 516, 524 (Utah 1994) (quoting *State v. Jones*, 823 P.2d 1059, 1063 (Utah 1991)). Additionally, "whenever there is 'a legitimate exercise of professional judgment in the choice of trial strategy, the fact that it did not produce the expected result does not constitute ineffectiveness of counsel.'" *Id.* (quoting *State v. Bullock*, 791 P.2d 155, 160 (Utah 1989)). In essence, the question is "[w]as the failure to raise the objections before the trial court the result of a consciously chosen strategy of trial counsel rather than an oversight, and if it was a strategic decision,

did the making of that choice constitute ineffective assistance of counsel?" *Bullock*, 791 P.2d at 158-59.

¶35 We have previously analyzed whether trial counsels' failure to object to victim testimony at trial is merely trial strategy. *Id.* at 155. In *Bullock*, a child sexual abuse case, the defendant argued his trial counsel was ineffective in failing to argue that videotaped testimony of alleged child abuse victims and expert testimony was inadmissible. *Id.* At trial, videotaped testimony of four boys describing the alleged abuse was presented to the jury, and the social worker to whom the boys first disclosed the abuse was questioned at trial. *Id.* at 156. Among other things, defense counsel did not object to the admissibility of the out-of-court statements, the videotaping procedures, or the expert witness's testimony that the children were victims of sexual abuse. *Id.* at 157-58.

¶36 We found that allowing the jury to hear the videotaped descriptions and the expert testimony and then cross-examining the expert to attack the credibility of the children's accusations was defense counsels' strategy. *Id.* at 160. Defense counsel attempted to "attack the quality of the State's evidence in an effort to persuade the jury of the insufficiency of the evidence to support a conviction." *Id.* at 158. We held that counsel in *Bullock* was not objectively deficient because "[w]hile the evidence complained of may have been inadmissible, trial counsel could reasonably conclude under these circumstances that there was little chance of keeping the testimony of the children

out of evidence," and that it was necessary to allow the expert testimony of the social worker in order for defense counsel to challenge the veracity of the expert's techniques. *Id.* at 159. We also took into account that defense counsels' presentation of defense experts and evidence of defendant's good character and reputation for truthfulness was consistent with a rational defense strategy. *Id.* at 158.

¶37 Mr. Ott's counsels' failure to object to the victim impact evidence presented in this case cannot be construed to be a component of any rational defense strategy. The State presents us with what it views as one defense strategy that would include tolerating the admission of prejudicial and inflammatory inadmissible evidence: one that employed as its central features avoiding the perception that Mr. Ott was "pushing Lacey aside" while presenting Mr. Ott as a remorseful man who took responsibility for his actions. The State argues that any objection made to the victim impact evidence would minimize the effect of this strategy.

¶38 We conclude, however, that counsels' overall strategy was not just to avoid dishonoring Lacey's death, but also to present Mr. Ott as someone who could be rehabilitated and who deserved the possibility of parole. In *State v. Hovater,* we noted if "the evidence ha[s] no conceivable beneficial value to [the defendant], the failure to object to it cannot be excused as trial strategy." 914 P.2d 37, 42 (Utah 1996). Victim impact testimony that portrayed Mr. Ott as a murderer who was motivated by a desire to terrorize

his victims and who is beyond rehabilitation does not conceivably support Mr. Ott's defense under the State's theory or any other that could be rationally constructed.

¶39 We note that avoidance of drawing the jury's attention to certain facts or over-emphasizing aspects of the facts is a well recognized trial strategy. *See State v. Harter*, 2007 UT App 5, ¶ 16, 155 P.3d 116 (finding strategic decision in failure of defense counsel to argue for curative jury instruction on implication of defendant's flight because defense counsel did not want to emphasize the fact that defendant fled the scene of the crime). In Mr. Ott's case, however, tactical methods were available to his counsel, which could have limited the type of victim impact evidence admitted. For instance, Mr. Ott's counsel could have sought exclusion of the victim impact evidence about Mr. Ott's character through a motion in limine. A decision not to object to the victim impact evidence, especially when the evidence violated existing precedent prohibiting victims expressing opinions about the sentence or the defendant's character, falls below the line of objective reason and therefore amounts to ineffective assistance of counsel.

B. Mr. Ott's Objectively Deficient Representation Prejudiced Mr. Ott

¶40 We also hold that Mr. Ott's objectively deficient representation prejudiced him. A defendant "is prejudiced by counsel's actions only if the result of

the proceedings would have been different absent the claimed deficiency." *State v. Greuber,* 2007 UT 50, ¶ 9, 165 P.3d 1185. "To show prejudice in the ineffective assistance of counsel context, the defendant bears the burden of proving that counsel's errors 'actually had an adverse effect on the defense' and that 'there is a reasonable probability that, but for counsel's . . . errors, the result of the proceeding would have been different.'" *State v. Santana-Ruiz,* 2007 UT 34, ¶ 20, 2007 WL 1095559 (quoting *Strickland v. Washington,* 466 U.S. 668, 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Taylor v. State,* 2007 UT 12, ¶ 56, 156 P.3d 739 (quoting *Strickland,* 466 U.S. at 694). "Because' [s]ome errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated trivial effect,' in determining the effect of the error, we 'consider the totality of the evidence before the . . . jury.'" *State v. Hales,* 2007 UT 14, ¶ 86, 152 P.3d 321 (alterations in original) (quoting *Strickland,* 466 U.S. at 695-96).

¶41 In this case, the record discloses that there is a reasonable probability that but for the admission of the victim impact evidence that addressed Mr. Ott's character and the victims' opinions of the appropriate sentence, Mr. Ott would have received a more favorable sentence. The admission of the evidence sufficiently undermines our confidence in Mr. Ott's sentence.

¶42 In *State v. Kell,* we analyzed the prejudicial effect of victim impact evidence. 2002 UT 106, ¶¶ 52-54, 61 P.3d 1019.[4] Mr. Kell, already incarcerated for murder, was charged with the aggravated murder of Mr. Blackmon, another inmate, and Mr. Kell was convicted and sentenced to death. *Id.* ¶¶ 1-2. At the guilt phase of the trial, the victim's family testified about the pain, devastation, and anguish the loss of the victim had caused them. *Id.* ¶ 52 n.15. We concluded that the victim impact evidence in Mr. Kell's case was not prejudicial. In making that determination, we emphasized that the family's victim impact testimony was "[not] particularly inflammatory," "moderate in tone, descriptive of the family's loss and mourning but not militant or angry," and made "no effort to pressure the jury to impose the death penalty." *Id.* ¶¶ 53-54. Specifically, a statement prepared by the victim's family and read to the court stated:

> Concerning the penalty phase for this individual, the family has an abiding conviction that man's laws were written for the unjust and for evildoers. Therefore whatever punishment is meted out by this Court or this

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[4] The prejudice of victim impact evidence in *Kell* was addressed under the prejudice prong of a plain error analysis. We have previously held, however, that a prejudice analysis is the same under both a plain error and ineffective assistance of counsel framework. *State v. Parker,* 2000 UT 51, ¶ 10, 4 P.3d 778 ("The prejudice test for ineffective assistance of counsel claims is equivalent to the harmfulness test applied in assessing plain error.").

> jury, whether it be the death penalty or some other sentence, my family will accept that ruling.

Id. ¶ 52 n.15.

¶43 In concluding that the admission of the victim impact evidence did not prejudice the defendant, and therefore did not undermine our confidence in the outcome, we found it important to note that the victims' statements "did not ask for the death penalty, but left the decision up to the jury in remarkably neutral terms." *Id.* ¶ 53. "In fact, the family specified that they would respect any decision the jury made." *Id.*

¶44 The content of victim impact testimony in Mr. Ott's case is dramatically more inflammatory than the evidence admitted in *Kell.* Here, the victim impact evidence comprised a large portion of the total evidence presented. The testimony was angry in tone, inflammatory in content and contained messages that Mr. Ott was beyond rehabilitation. The existence of these factors, especially considering that Mr. Ott's counsel never uttered a word objecting to the admission of the evidence, undermines our confidence in the outcome.

¶45 The State argues mitigation evidence presented by Mr. Ott's counsel ameliorates any prejudicial or inflammatory effect the victim impact evidence had. Our caselaw addressing prejudice under *Strickland* suggests that deficient counsel that leads to the admission of inflammatory statements is not

prejudicial if other mitigating statements or evidence is presented. For instance, in *State v. Dunn* we held that a defendant was not prejudiced by his counsels' failure to request a jury instruction concerning uncorroborated witness testimony because the county attorney had testified that the witness's testimony was given in exchange for a reduction in his own charge, the witness admitted on the stand to be a pathological liar, and the judge instructed the jury that they may disregard evidence they deemed incredible. 850 P.2d 1201, 1226-28 (Utah 1993). The ameliorating statements mitigated any prejudicial effect the absence of an uncorroborated witness jury instruction may have had on the outcome of Mr. Dunn's trial. *Id.*

¶46 Mr. Ott's case does not present an instance where the mitigating evidence presented negates the prejudicial effect of the unlawful victim impact evidence. The single question before the jury was whether Mr. Ott should receive a sentence of life with parole or life without parole. Implicit in a sentence of life with the possibility of parole is a belief by the jury that Mr. Ott could one day be rehabilitated and reenter society. Underlying the jury's decision is the large amount of evidence addressing Mr. Ott's mental health, including any mood or personality disorders.

¶47 Dr. Egli, the prison psychiatrist who treated Mr. Ott, testified that Mr. Ott was responding positively to medication. Mr. Ott's counsel also presented evidence of Mr. Ott's tumultuous childhood, war experience, and numerous psychiatric hospital

stays leading up to the night of the crime wherein he may have been improperly medicated. While persuasive, this evidence does not, in our judgment, neutralize in any meaningful way the prejudicial effect that the characterization of Mr. Ott as a murdering "terrorist" made by people who directly encountered Mr. Ott on the night of the crime. That he was improving while medicated in prison did nothing to mitigate the numerous statements made that, once released, Mr. Ott would become uncontrollable. In considering "'the totality of the evidence before the . . . jury,'" *Hales*, 2007 UT 14, ¶ 86 (quoting *Strickland*, 466 U.S. at 695-96), we must conclude that counsels' failure to object to the inadmissible evidence undermines confidence in the outcome and therefore prejudiced Mr. Ott.

¶48 We therefore remand to the trial court with instructions to afford Mr. Ott a new sentencing hearing.

CONCLUSION

¶49 The facts and issues presented by this case are very complex. Although we first questioned whether Mr. Ott could properly plead to aggravated murder, we are without jurisdiction to address his guilty plea because his failure to move to withdraw the plea is a jurisdictional bar on this court. Mr. Ott brought several claims addressing his counsels' ineffective assistance. Today, we address only the argument that his counsel provided ineffective assistance

for failing to object to victim impact evidence. Specifically, we hold that counsel was objectively deficient for failing to object to victim impact evidence that addressed Mr. Ott's character, chances for rehabilitation, and deserved sentence because such victim impact evidence clearly violates the Eighth Amendment when introduced in capital sentencing hearings. Counsels' failure to object to this evidence also prejudiced Mr. Ott such that the objectively deficient counsel constitutes ineffective assistance of counsel. We remand to the trial court for a new sentencing hearing consistent with this opinion.

¶50 Associate Chief Justice Durrant and Justice Wilkins concur in Justice Nehring's opinion.

DURHAM, Chief Justice, concurring:

¶51 I concur fully in the analysis and result of the majority opinion on the federal issue, but write separately to note my concern at the failure to engage first with the state law questions properly preserved and briefed. Structurally, I believe this court should determine first whether state law has been complied with before addressing claims that the federal Constitution has been violated. *West v. Thomson Newspapers*, 872 P.2d 999, 1005-06 (Utah 1994) (adopting the primacy approach wherein the court "looks first to state constitutional law, develops independent doctrine and precedent, and decides federal questions only when state law is not dispositive," and thus provides for a "consistent method" that accords "with

the original purpose of the federal system" (internal quotation marks omitted)); *see also State v. Briggs*, 2008 UT 83, ¶ 52, 199 P.3d 935 (Durham, C.J., concurring) ("The failure to undertake independent state analysis in cases where state law is argued contributes to a paucity of precedent and the absence of an independent and adequate state ground for our holding."); *State v. Tiedemann*, 2007 UT 49, ¶ 32, 162 P.3d 1106 ("[I]t is part of the inherent logic of federalism that state law be interpreted independently and *prior to* consideration of federal questions."); *Jeffs v. Stubbs*, 970 P.2d 1234, 1248 (Utah 1998) ("[W]hen a party asserts claims under both the Utah and federal Constitutions, this court ordinarily first determines the issue under the Utah Constitution and only resorts to the federal Constitution if the state constitution is not dispositive.").

¶52 Justice Parrish concurs in Chief Justice Durham's concurring opinion.

IN THE UTAH SUPREME COURT

State of Utah,

Plaintiff and Appellee,

v.

Mark Anthony Ott,

Defendant and Appellant.

Case No. 20040638-SC

(Filed Jun. 11, 2010)

ORDER

This matter is before the court upon Appellee's Petition for Rehearing, filed on February 9, 2010. The Appellant's filed a response to the Petition for Rehearing on March 30, 2010.

IT IS HEREBY ORDERED that pursuant to Rule 35 of the Utah Rules of Appellate Procedure the petition for rehearing is denied. FURTHER the opinion has been corrected. There is no change to the result. A copy of the corrected opinion is included with this order.

For The Court:

6-11-10 /s/ [Illegible]

Date Matthew B. Durrant
Associate Chief Justice

No. 10-490

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF UTAH,

Petitioner,

vs.

MARK ANTHONY OTT,

Respondent.

On Petition for Writ of Certiorari
to the Utah Supreme Court

BRIEF IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

The Crimes

Mark Ott cut the phone lines and broke into his own home looking for Allen Lawrence, who had been in Ott's bed with Ott's wife, Donna, after the Otts had made a commitment to reconcile in their difficult marriage (R1374: 80; R. 1375: 18, 85; Defense Exhibit 8 p. 35). When Ott entered the bedroom, Allen Lawrence tried to shut the door on and grabbed Ott, who stabbed Lawrence twenty-three times in about twenty seconds, causing severe life-threatening injuries (R1375: 95-97, 117; R. 1381:112, 161). In the course of Ott's frenzied knife attack on Allen Lawrence, Ott also stabbed Ott's stepdaughter, Sarah, who tried to intervene, although she later recognized he may not have intended to stab her (R. 1381: 192). Ott continued stabbing Allen Lawrence until the knife broke off in Lawrence's back, at which point Sarah helped Lawrence flee Ott's home (R1374: 86, 89; R. 1375: 119, 146). Ott, who had cut his own neck, trailed his own blood to the garage before dousing gasoline inside the house and setting it on fire (R. 1381: 141, R1375: 23, 25, 147). Donna retrieved her daughter, Lucy, and Lucy's friend from the basement, directing them to flee to the neighbor's and call the police, before Donna also fled (R. 1375: 57). Ott made no effort to stop anyone from leaving the home, and fled the scene in Donna's Explorer (R1375:28-29).

Allen Lawrence's six-year-old daughter, Lacey, who had been sleeping in the Otts' youngest daughter's bedroom, died of carbon monoxide poisoning from the fire (R1376: 114-115). Mark Ott did not know Lacey Lawrence was in his home when

he set it on fire (R1378:134-35). Her death was an accident (R1381: 11).[1]

Proceedings in the Trial Court

Prior to trial in what was then a death penalty case, the prosecution notified the defense of its intent to introduce the "Meet Lacey Lawrence" videotape in the penalty phase of the trial (R. 1141).[2] The prosecution also gave pretrial notice of its intent to call Lacey's mother as a witness. Lacey's mother was not involved in the crimes (e.g. R. 1141).

Despite having received notice that the State intended to present highly prejudicial victim impact evidence concerning Lacey Lawrence, and despite the fact that Ott did not know Lacey was present and had no intention of killing her when

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[1]The State conceded from the outset of the case that Ott did not know that Lacey Lawrence was in his home (R1381: 11). In the recording of Ott's first extradition hearing in Idaho, he can be heard crying when the judge told him someone died in the fire. In the recording of the second extradition hearing, he can be heard sobbing when the judge told him a six-year-old child had died in the fire. From the comments made by the judge and the judge's tone of voice, it appears that Ott was not tracking mentally during the hearings (R. 1377: 6-7). Ott repeatedly tried to commit suicide in Idaho before his extradition, and in the Utah facilities where he was held prior to trial (R1377:153-61; Defense Exhibit 8 p. 49).

[2]"Meet Lacey Lawrence" is a powerfully moving six minute movie of Lacey and her loved ones sharing the milestones in Lacey's life. It begins with her as a baby being held, fed and bathed by her family members, crawling, rolling over, and walking. It shows her as a small child attending parties, celebrating Christmas, singing "Happy Birthday," blowing out candles, eating birthday cake, smiling, playing, riding a horse with her father, and dancing. It also depicts what appears to be her artwork, including her drawing of a little girl in bed, and her writing of, "I love you Mommy" amidst raindrops or teardrops. It ends with the dates of her birth and death, showing that she died two weeks before her seventh birthday (R1376:172). It is set to "You'll Always Be a Part of Me," sung by Billy Joel and "It's a Wonderful World," sung by Louis Armstrong.

he set the fire, his attorneys did not file a motion in limine to prevent the jurors who would decide his fate of life or death from hearing improper victim impact evidence.

After jury selection began, Ott entered an Alford plea to capital murder, and pled guilty to attempted aggravated murder, aggravated arson, and aggravated assault (R1121-1133, 1135). The prosecution agreed to remove the death penalty as a sentencing option and dismissed other charges (R. 1135).

In the penalty phase trial wherein the jurors were to determine if Ott would serve life with or without parole, the State presented the testimony of Lacey's family members and friends characterizing Ott and his crimes, and asking the jurors to impose the maximum sentence of life without parole.[3] The State also presented the "Meet Lacey Lawrence" recording and other highly prejudicial evidence concerning the pain Lacey's family members and friends suffered as a

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[3]See Pet. App. at 17-18 (Allen Lawrence characterized Ott as a psychopathic terrorist who deals with anarchist cookbooks, who had no empathy for others, respect for their rights or feelings or pursuit of happiness, who would not have taken Lacey out of his house had she known she was there and thought no more of killing others than picking an apple off a tree); Pet. App. at 18-19 (Donna Ott predicted that if Ott were paroled in twenty years, she would expect him to come looking for them and repeat his crimes because he was a control freak who lives his life by threatening others to get what he wants); Pet. App. at 19-20 (Sarah Gooch predicted that Ott would not change, and if paroled would likely be more angry from the time spent in prison); Pet. App. at 20 (Lucy Gooch predicted that if Ott were paroled at any age, he would come out and finish the crimes he started); Pet. App. at 20-22 (Amber Lawrence opined that Ott should not be alive or have any rights, and did not care who he killed), and Pet. App. at 22 (Terry Cook testified that she hoped Ott would not be paroled, but would spend the remainder of his life thinking about her life-long pain).

result of her death.[4]

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[4]Lacey's mother, Terry Cook, had no ostensible prior dealings with Ott and was not involved in the crimes. She told the jurors of her five miscarriages which preceded her high risk pregnancy with Lacey, her only child. She told them the painful details of how she learned of Lacey's death on the morning that they were supposed to go choose a new kitten together (R1376: 162-67). She told them her life was destroyed; she could not sleep or work or go to school or socialize or have relationships, and had just started medication because counseling did not help (R1376:167-69). She also conveyed the pain felt by her parents and friends (R1376:170-71).

Lacey's step-sister, Amber Lawrence, sixteen years old at the time of the crimes, testified that Lacey was her only little sister, whom she had always wanted (R1376: 154, 158). Amber used to be an honor student, but had dropped out of school since Lacey's death and was trying to graduate in night school, but could not concentrate and had begun to stutter (R1376:157). She told the jurors that she was supposed to have been there at Ott's home on the night her little sister died (R1376:154). This was particularly disturbing testimony, given that their father had lain outside the home, too badly injured by Ott to go into the home and rescue Lacey, whose presence in the house was forgotten by others until it was too late (R1375:121-22; R1375:29-30).

Lacey's father, Allen Lawrence, was acquainted with Ott, as he had had two threatening confrontations with Ott when Ott found him with Ott's wife prior to the night in question (R1374: 237-38, 24-43, 148-55, 1375:105, R. 1381: 153). He testified that he knew his daughter was in the burning house but could not see or get up, and could not talk because he was gurgling with blood (R1375:121). He heard Donna scream that Lacey was in the house, and it was horrible for him not to be able to move to save his daughter and to just lie there trying to hold himself together and hoping someone could save her (R1375:120-22). He later overheard one med tech ask if they got the little girl out, and the other one answered no (R1375:123). That was the last thing he recalled hearing for a few days (R1375:123). He was in a morphine nightmare with the knowledge that he had been cut to ribbons and that his daughter was dead (R1375:123).

He told the jurors that for about a year after her death, he wished he was dead and would trade places with Lacey in a heartbeat (R1375:124-25). He talked of everyone's sadness, and detailed how his other daughter, Amber, had a nervous breakdown and was shock for months (R1375:125). Amber was a junior in high school at the time and never went back to school because of the stigmatizing effect of the crimes (R1375:125). He testified about how wonderful Lacey was and how much he loved being her father (R1375:128-31).

Donna Ott testified about the trauma she and her children suffered from Ott's crimes (R1375: 31-34). She testified that Lacey took care of Ott's daughter,

The requisite ten of twelve jurors entered the verdict of life without parole (R. 1189).

The Direct Appeal and Temporary Remand

On direct appeal in the Utah Supreme Court, and in the trial court during a temporary remand for inquiry into Ott's claims of ineffective assistance of counsel pursuant to Utah Rule of Appellate Procedure 23B, Ott argued that his lead appointed trial counsel harbored an actual conflict of interest.[5] He also argued that

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Carissa, who was three, and they were like sisters, and that Ott's son, William, was in love with Lacey (R1375:7).

Sarah Gooch testified about the emotional pain and difficulties she suffered as a result of Ott's crimes (R1374: 90-93). She testified that she tried to charge back into the fire to save Lacey because she was so little and sweet and could not do it herself, and must have been so scared (R1374: 94).

[5]Ott's appointed lead trial counsel, Caine, had been close friends with the lead prosecutor, Wilson, and Wilson's wife for thirty years (R2166:30-31, 74). Prior to and during Ott's prosecution, Caine and Wilson were working together in a civil suit filed on behalf of Wilson's wife, wherein Caine was to be paid an undetermined contingency fee (R. 2166: 31-32, 75). Wilson served on the government board that hired Caine to represent Ott. During the board's discussions concerning Caine's appointment, Wilson made no mention of Caine's friendship with Wilson and his wife or of the civil lawsuit (R2166:76-77). While Wilson testified that he did not seek Caine's appointment and abstained from voting on it (R2166: 76-78, 83; State's Exhibit 4, page 2), Wilson admitted he had discussions with board members outside board meetings regarding their hiring of Caine (R2166:79). The contract between Caine and the board, which Wilson helped draft and Caine signed, specifically averred that Caine had no conflict of interest in representing Ott (R2166:33-34, 80).

Caine pled Ott guilty to aggravated murder in an agreement purporting to foreclose all judicial review of the plea after sentencing (R. 1130). But see, e.g., Utah Code Ann. § 77-13-6 (authorizing challenges to pleas through the Post Conviction Remedies Act); Constitution of Utah Article I § 5 ("The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it."); Julian v. State, 966 P.2d 249, 253 (Utah 1998) (recognizing the writ as the greatest protector of individual liberty, as requiring the Courts to "maintain their fundamental power to "guarantee fairness

trial counsel were constitutionally ineffective in several ways.[6]

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and equity in particular cases.").

As the Utah Supreme Court tacitly recognized before holding that it had no jurisdiction to reach the issue and that Ott would have to wait until post-conviction to litigate the claim, Utah law in effect at the time of the plea strongly indicated that Ott's accidental homicide of Lacey Lawrence did not constitute aggravated murder, see Pet. App. at 7; State v. Thurman, 911 P.2d 371 (Utah 1996) (conviction of aggravated murder requires proof of knowing and intentional killing).

Caine and Wilson actively litigated the Wilsons' civil suit during Ott's prosecution. The day after pleading Ott guilty to capital murder for a crime that apparently was not capital in an agreement that purported to shield the agreement from judicial scrutiny, Caine filed a memorandum opposing a motion to dismiss the civil suit (R. 2166: 33).

Wilson testified that Caine discussed defense strategy with Wilson in reaching the agreement concerning the defense mental health expert, who was called at the last minute without time to prepare and without the filing of the statutorily-required notice. Wilson and Caine agreed he would not be asked questions concerning how Ott's mental illness may have influenced his behavior or ability to control himself during the offenses (R. 1378:53-55; R2166:89). In the 23B remand hearing incident to the appeal, once the expert was given the necessary information and time to review it, he was able to explain how Ott's bipolar disorder, traumatic brain injuries, PTSD, and improperly prescribed medications likely caused him to misperceive that he was being attacked when Lawrence grabbed him from behind when he entered the bedroom, and to then lose control and react with extreme and excessive rage and violence without being able to curb his response or understand its excessiveness or the unlawfulness of his conduct (R2166:106-113).

Caine and Wilson also agreed between themselves to play the "Meet Lacey Lawrence" recording for the jury (R. 1377: 7). They also agreed to exclude the "Meet Lacey Lawrence" recording from the record that would be the foundation of Ott's appeal of right (R. 1377: 7).

No one informed Ott or the trial court of the friendship or lawsuit until after the Utah Supreme Court temporarily remanded the case to the trial court (R2166: 33, 34, 137, 176; R 2148).

[6]In addition to trial counsel's failure to oppose the admission of highly prejudicial victim impact evidence, Ott challenged trial counsel's failure to investigate the underlying facts and mitigation evidence, mishandling of Ott's competency and mental health issues, failure to investigate and present evidence of Ott's bipolar disorder, PTSD and brain damage, failure to object to anonymous jury proceedings, agreement to withhold key evidence from the appellate record despite its admission for the jurors during the penalty phase, and filing of a tardy and

With regard to victim impact evidence, Ott argued that counsel's failure to develop and assert state and federal arguments to oppose the improper admission of victim impact evidence, and counsel's agreement to play the "Meet Lacey Lawrence" recording for the jurors but then exclude it from the appellate record, evinced the actual conflict of interest harbored by Ott's lead trial counsel and constituted ineffective assistance of counsel.[7]

In the evidentiary remand to the trial court, in its brief, and at oral arguments on direct appeal, the State never contended that Booth v. Maryland, 482 U.S. 496 (1987), or related state and federal law limiting the presentation of victim impact evidence in capital sentencing proceedings did not apply. Rather, the State conceded that Payne v. Tennessee, 501 U.S. 808 (1991), applied, and that under Payne, the "Meet Lacey Lawrence" recording probably caused the most concern, and that the musical accompaniment to the recording may have been so

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inadequate challenge to the life without parole statute. See, e.g., Ott's opening brief at 37-113.

[7]E.g., Memorandum in support of 23B Remand at 2, 15-21, 36-44; Reply Memorandum in support of 23B Remand at 17-21; Opening brief of Appellant at 14-19, 34-35, 86-95; Reply brief of Appellant at 19-22.

The State's certiorari petition gives the incorrect impression that Ott's primary issue on appeal was an unpreserved claim concerning the improper admission of victim impact evidence, and argues as if Ott argued ineffective assistance as a means of avoiding the waiver of the victim impact claim. See State's petition at 10. As detailed above, the failure to oppose the admission of victim impact evidence was one part of Ott's multi-faceted conflict of interest and ineffective assistance of counsel claims. In asking the Utah Supreme Court to rule on issues that were not preserved, he asserted the plain error, cumulative error and exceptional circumstances doctrines. See Ott's opening brief at 113-121.

unduly prejudicial as to have rendered the trial fundamentally unfair under the Due Process Clause, although counsel for the State did not think it did.[8] The State took the position that trial counsel made a reasonable strategic choice to include all victim opinion statements and victim impact evidence to show Ott's remorse, empathy and acceptance of responsibility for his crimes.[9] At oral argument, after Justice Parrish observed that a motion in limine would have served to exclude improper evidence without the jury becoming aware of it, thus allowing Ott to show his remorse while shielding the jurors from unduly prejudicial evidence, the State argued that trial counsel made a strategic decision not to object, and that even if his performance in that regard was deficient, it was not prejudicial. See oral argument at minutes 36-37.

The Utah Supreme Court did not reach the majority of Ott's claims. It first ruled that it had no jurisdiction on direct appeal to determine whether Ott's accidental killing of Lacey Lawrence constituted aggravated murder under Utah law, ruling that Ott would have to wait until post-conviction proceedings to litigate that issue. Pet. App. at 7, 9-11. The court then held that trial counsel were constitutionally ineffective in representing Ott in failing to file a motion in limine or otherwise object to the presentation of victim impact evidence. E.g., Pet. App. at 26.

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[8] State's memorandum opposing 23B remand at 26-29; State's brief at 61-62; May 2008 oral arguments found at http://www.utcourts.gov/courts/sup/streams/ at approximately at minutes 31 through 37.

[9] See May 2008 oral arguments, *supra*, State's 23B memorandum at 26-29, State's brief at 63-66.

In a petition for rehearing, the State claimed for the first time that Booth did not apply to Ott's capital sentencing hearing because the prosecution agreed not to seek the death penalty. State's Petition for Rehearing at 3-5.[10] Ott answered that the State's claim was not timely made. Answer to Petition for Rehearing at 1-5. He also argued that under Strickland v. Washington, 466 U.S. 688, 689 (1984), counsel's failure to oppose the admission of victim impact evidence should be adjudged without the distorting influence of hindsight, and that because his case was a death penalty case at the time that trial counsel received notice of victim impact evidence, trial counsel were ineffective in failing to interpose Booth and other law to block the evidence. Answer to petition for rehearing at 5-15. The Utah Supreme Court denied rehearing without addressing the State's belated contention that Booth did not apply.

REASONS FOR DENYING THE WRIT

The State asks the Court to overrule the portion of Booth v. Maryland, 482

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[10]The State's certiorari petition makes no mention of its concessions during the direct appeal concerning the applicability of Payne, and argues as if its first opportunity to argue that Booth did not apply was in its rehearing petition, because neither party relied on Booth before the court decided Ott. See State's petition at 11. Ott plainly contended that the victim impact statements violated the Eighth Amendment, and he cited the portions of Payne which reiterate and cite to Booth's holding that victims' family members' opinions on the defendants, crimes and sentences are inadmissible under the Eighth Amendment. See Ott's 23B memorandum at 37 and opening brief at 87, relying on Payne v. Tennessee, 501 U.S. 808 (1991) at 829 n.2 (main opinion), and at 833 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy), and at 835 (concurring opinion of Justice Souter, joined by Justice Kennedy).

U.S. 496 (1987), pertaining to victim opinion testimony. It argues as a fallback position that Booth did not apply in Ott's case because the prosecution ultimately opted not to seek the death penalty. Ott addresses the State's contentions in reverse order, as the Court normally overrules its precedents only as a last resort.

The Court should deny the writ on the question concerning whether Booth applies to a capital penalty phase trial wherein death is not a sentencing option but the jury returns a verdict of life without parole. The State failed to raise its current claims in a timely manner in the state courts, but instead took a contrary position, that Payne applied to Ott's sentencing proceeding.

Like the explicit holding of Ott, the Utah Court of Appeals has held that Ott bars victim opinion statements only in capital penalty phase trials. Victim opinion evidence remains admissible in non-capital sentencing hearings in Utah. Utah's jurisprudence on the applicability of Booth comports with this Court's case law and that of other jurisdictions. On the unique procedural facts of this case, the Utah Supreme Court correctly determined that trial counsel were ineffective in having failed to assert Booth.

The Court should not overrule Booth's proscription of victim opinion testimony. Booth is an important part of the fabric of our capital sentencing law which has been followed by the lower courts without difficulty for over twenty years. The portion of Booth pertaining to victim opinion evidence was soundly reasoned, and there is no persuasive reason to reconsider it.

Ott is not a suitable case for reconsideration of the portion of Booth

pertaining to victim opinion testimony. If the Court overruled Booth, Ott would nonetheless be entitled to reversal in this Court or on remand on a number of alternative bases. Trial counsel were constitutionally ineffective in multiple instances, and lead counsel labored under an actual conflict of interest which resulted in the prosecution's intrusion into Ott's Sixth Amendment right to counsel. The "Meet Lacey Lawrence" recording, victim impact evidence, and victim opinion testimony were inadmissible under Utah law, and the "Meet Lacey Lawrence" recording violated Payne v. Tennessee, 501 U.S. 808, 825 (1991). Trial counsel were thus constitutionally ineffective in failing to oppose the victim impact evidence under authorities other than Booth. The procedural history of the case and the ineffective assistance framework of the opinion below render Ott unduly cumbersome for reconsideration of Booth. In the event the Court wishes to reconsider Booth, the Court should await a more appropriate and true capital case.[1]

I. THIS COURT SHOULD DECLINE TO REVIEW WHETHER THE UTAH SUPREME COURT PROPERLY APPLIED BOOTH TO OTT'S SENTENCING PROCEEDING.

A. THE ISSUES ARE NOT PROPERLY BEFORE THE COURT.

This Court generally refuses to address claims that were not raised or ruled on below, particularly in cases wherein the lower courts were state courts. See, e.g.,

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[1]Utah law in effect at the time of the plea strongly indicated that Ott's accidental homicide of Lacey Lawrence did not constitute aggravated murder, see Pet. App. at 7; State v. Thurman, 911 P.2d 371 (Utah 1996) (conviction of aggravated murder requires proof of knowing and intentional killing).

Clark v. Arizona, 548 U.S. 735, 761-65 (2006). Whether viewed as jurisdictional or prudential, this requirement serves the interest of comity in our federalist system, by insuring that state courts have the opportunity to address federal issues. It also serves judicial economy, as it encourages early resolution of issues in state courts, thus alleviating the need for federal review. See Adams v. Robertson, 520 U.S. 83, 90 (1997). The requirement also insures that the matters are properly litigated below so that this Court's decisions are premised on adequate records. Id. at 90-91.

As detailed above, the State failed to timely argue in the state courts that this Court's victim opinion and victim impact jurisprudence under Booth and Payne did not apply because the death penalty was removed as a sentencing option after the trial began. Rather, after consistently conceding the applicability of Payne, the State made the contradictory claim for the first time on rehearing. Arguments made for the first time on rehearing are untimely for purposes of review on certiorari.[12] Because the State did not present its claims in timely fashion during the remand proceedings or on direct appeal, but instead conceded the applicability of the Eighth Amendment victim opinion jurisprudence in the lower state courts up until filing the contradictory petition for rehearing, this Court should deny

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[12]See, Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 128 (1945) ("Questions first presented to the highest State court on a petition for rehearing come too late for consideration here.")

The Utah Supreme Court generally declines to address arguments made for the first time on rehearing. See Swanson v. Sims, 170 P. 774, 778 (Utah 1917). This is particularly so when arguments made on rehearing are inconsistent with prior arguments made to the court. See Lockhart Co. v. Anderson, 646 P.2d 678, 681 (Utah 1982)

certiorari. See Adams and Johnson, *supra*.

B. THE UTAH SUPREME COURT'S HOLDING IS LIMITED TO CAPITAL SENTENCING PROCEEDINGS AND IS CONSISTENT WITH OTHER DECISIONS APPLYING BOOTH.

The Utah Supreme Court's holding in Ott is expressly limited to capital cases. The opinion states:

> Specifically, we hold that counsel was objectively deficient for failing to object to victim impact evidence that addressed Mr. Ott's character, chances for rehabilitation, and deserved sentence because such victim impact evidence clearly violates the Eighth Amendment when introduced in capital sentencing hearings.

Pet. App. at 32. Consistent with Ott's holding and procedural context, the Utah Court of Appeals has held in a published opinion that Ott does not apply to non-capital sentencing hearings. Rather, Ott prohibits victims from opining on sentences "only in capital sentencing hearings[.]" State v. Shaffer, 2010 UT App 240, ¶ 31 n.8, 239 P.3d 285.

Ott is thus consistent with the cases cited in footnote 12 of the State's certiorari petition, which similarly limit the application of Booth to capital cases.[13]

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[13]See United States v. Horsfall, 552 F.3d 1275, 1284 (11th Cir. 2008), cert. denied, 129 S.Ct. 2034 (2009) (recognizing that Booth is limited to capital sentencing proceedings in rejecting plain error claim in non-capital child pornography case); Hatcher v. Duckworth, 917 F.2d 1306 at *1 and *2 (7th Cir. 1990 (unpublished) (refusing to apply Booth in a robbery case on habeas because Booth applies only in capital cases); United States v. Santana, 908 F.2d 506, 507 (9th Cir. 1990) (affirming court's consideration of victim impact evidence in non-capital bank robbery case, recognizing that Booth applies only in capital cases); Disotell v. Warden La. Corr. Inst. for Women, 2010 WL 2483420, *6 (W.D. La. 2010) (slip copy) (rejecting Payne challenge to victim impact evidence in non-capital manslaughter habeas case); Razo v. Blair, No. 08-1106-PHX-NVW, 2010 WL 1433487, * 15 (D.

Four of the State's cases reject Booth claims in capital cases wherein the death penalty was not a sentencing option. They differ from Ott in two ways. First, none of them involved ineffective assistance of trial counsel who failed to oppose the admission of victim impact evidence when the case was a death penalty case, as Ott did. Second, they all involve sentences imposed by judges, rather than juries, and thus do not involve the dangers Booth sought to avoid which required reversal in Ott – victim impact evidence unduly influencing jurors to impose sentences in an arbitrary and capricious fashion, see Booth, 482 U.S. at 503.[14]

Ariz. Feb. 11, 2010) (slip copy) (rejecting Payne challenge to victim impact evidence in non-capital habeas case involving manslaughter and lesser charges); Mahan v. Cate, No. CV08-04699 ABC, 2009 WL 3244911, *2, (C.D. Calif. Oct. 2, 2009) (unreported) (rejecting Payne challenge to victim impact evidence in non-capital habeas case involving sodomy charges); Cooey v. Anderson, 988 F.Supp. 1066 (N.D. Ohio 1997) at 1083-87 (finding claim of Booth error in guilt phase was procedurally defaulted) and at 1089-91 (N.D. Ohio 1997) (deferring to state court's rejection of Booth claim in death penalty case because state court found that trial court considered victim impact statements only in sentencing on non-capital crimes); State v. Tyler, 565 S.E.2d 368, 376-77 and n.11 (W. Va. 2002) (rejecting Booth claim in robbery case because court did not give undue emphasis to victim impact testimony; recognizing that Booth applies only in capital sentencing proceedings).

[14]See People v. Ratzke, 625 N.E.2d 1004, 1008, 1017 (Ill. 1993) (court, not jury, properly relied on victim impact evidence in case where jury found defendant ineligible for death penalty prior to sentencing hearing; recognizing that Booth does not apply to non-capital sentencing proceedings); Randell v. State, 846 P.2d 278, 280 (Nev. 1993) (*per curiam*) (court, not jury, properly considered victim impact statement in case where death penalty removed as a sentencing option in plea bargain; court recognized that Booth does not apply to non-capital cases); State v. Searcy, 798 P.2d 914, 919 (Idaho 1990) (rejecting Booth claim in death penalty case wherein life sentence was reached by a court, rather than a jury); Kills On Top v. State, 15 P.3d 422, 437 (Mont. 2000) (rejecting Booth claim where court, not jury, imposed sentences of life and life without parole, after death was removed as a sentencing option by state supreme court).

The State claims that the highest courts of Ohio and Kansas mistakenly extend Booth beyond its holding and core reasoning. State's petition at 28-29, citing State v. Harwell, 102 Ohio St. 3d 128, 807 N.E.2d 330 (2004); and State v. Gideon, 257 Kan. 591, 894 P.2d 850 (1995). Assuming this were true, it would not justify a grant of certiorari in Ott's case. Review of Harwell and Gideon confirms that like Ott, they do not improperly extend Booth.

State v. Harwell, 102 Ohio St. 3d 128, 807 N.E.2d 330 (2004), interpreted the Ohio sentencing scheme in determining that the offense charged against the defendant was capital, and entitled him to the same procedural protections applicable in all capital cases, regardless of whether death is a sentencing option. Id. at 331-32. One of the procedural protections at issue in Harwell was a victim impact claim, and the Harwell opinion referred to another case on victim impact evidence which relied in part on Booth in reversing a death sentence.[15] However, Harwell did not mention, cite to or rely on Booth or any other federal constitutional provisions or authorities in interpreting the Ohio statutory scheme. See id.

State v. Gideon, 257 Kan. 591, 894 P.2d 850 (1995), determined that the defendant's forty year sentence imposed by a court did not violate a Kansas statute forbidding sentences to enter on the basis of "passion, prejudice or any other arbitrary factor," and rejected Gideon's complaints about victim impact testimony in that context. Id., 894 P.2d at 862-64. After providing a general discussion of victim

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[15]Id. at 331, citing State v. Huertas, 51 Ohio St.3d 22, 553 N.E.2d 1058 (1990), overruling recognized, Keith v. Mitchell, 455 F.2d 662 (6th Cir. 2006).

impact law addressing Payne v. Tennessee, 510 U.S. 808 (1991); Darden v. Wainwright, 477 U.S. 168 (1986), and a state law case interpreting a Minnesota victim impact statute, State v. Yanez, 469 N.W.2d 452 (Minn. App. 1991), the Gideon court reasonably directed trial courts presiding over jury sentencing proceedings to exercise control in admitting victim impact evidence to avoid reversible error. Gideon, 894 P.2d at 864. Like Ott and Harwell, Gideon did not extend Booth.

Because there is no split of authority over whether Booth applies in a capital penalty phase trial such as Ott's, this Court should deny the State's petition for certiorari.

C. THE EIGHTH AMENDMENT APPLIES TO LIFE WITHOUT PAROLE SENTENCES.

Assuming that Ott is properly read as applying Booth and Payne to a capital case wherein death is not a possibility, without regard to the procedural history or ineffective assistance of counsel actually involved, Ott is correct. The rationale behind Booth's bar of victim opinion statements in capital penalty phase trials is that such evidence "can serve no other purpose than to inflame the jury and to divert it from deciding the case on the relevant evidence concerning the crime and the defendant." 482 U.S. at 508. While the rationale does not apply to ordinary non-capital sentencing hearings before judges, who enjoy great discretion in considering virtually unlimited information in sentencing hearings, e.g., Williams v. New York, 337 U.S. 241, 246 (1949), the rationale applies directly and equally to a

capital penalty phase trial, wherein the jury decides the defendant's ultimate fate of life in prison without parole or death.

This Court recently held that Eighth Amendment principles designed to avoid arbitrary sentencing in capital prosecutions apply to cases involving life without parole sentences, because of the severity of that sentence. See Graham v. Florida, 176 L.Ed.2d 825, 130 S.Ct. 2011 (2010). In Graham, in the course of explaining why the Eighth Amendment does not permit a life without parole sentence to be meted out on a juvenile non-homicide offender, the Court reiterated its Eighth Amendment jurisprudence accounting for the severity of the life without parole sentence. Graham, 130 S.Ct. at 2027-28, discussing, e.g., Harmelin v. Michigan, 501 U.S. 957, 1001 (1991). The Court recognized that a sentence of life in prison without parole shares characteristics with a death sentence, because it irrevocably forfeits the offender's most basic liberties, extinguishes all meaningful hope for relief, and guarantees that the offender will live the remainder of his life and die in prison, regardless of any progress or changes he might achieve or experience. See id.

Given the final, destructive, and utterly demoralizing nature of a life without parole sentence, see id., jurors considering such a sentence should be protected from highly prejudicial evidence which has no meaningful probative value, such as the victims' family members' opinions and characterizations of the defendant, his crimes and his deserved sentence. See Booth. A sentence with such severe consequences to the offender and society as a whole should not turn on heartfelt

personal opinions. Rather, it should be reached only through the exercise of carefully channeled discretion Cf. id.

To the extent that pre-Graham cases may be inconsistent with this, they are subject to reevaluation in light of Graham. At a minimum, this Court should allow the issue to develop in the lower courts and wait to decide the issue in a case wherein Graham has been considered.

D. OTT IS CORRECTLY DECIDED.

Review of the procedural history of the case and the law governing Ott's claim of ineffective assistance of counsel demonstrates why the State was correct in its concessions below that Payne controls. Strickland v. Washington, 466 U.S. 688 (1984), requires courts evaluating deficient performance claims to assess counsel's decisions, actions and omissions in context at the time they were made, without the "distorting effects of hindsight." Id. at 689. Trial counsel had the duty to investigate both the facts and the law prior to Ott's trial, and to assert current law and protect Ott's rights at all times. See, e.g., Strickland at 687-88, 690; ABA Guidelines 10.8 and 10.10.1.[16] Trial counsel's duty to develop and present state and federal arguments exploring and opposing the admission of victim impact evidence arose prior to trial, see id., certainly no later than when the prosecution gave notice

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[16]Because Ott's was a death penalty case up until Ott pled to capital murder and the death penalty was removed as a sentencing option, the ABA standards were the guidelines applicable to trial counsel's pretrial preparation. See Wiggins v. Smith, 539 U.S. 510, 522 (2003) (characterizing these guidelines as "standards to which we long have referred as 'guides to determining what is reasonable.'").

days before the trial began of its intent to call Lacey's mother to testify despite not having been involved in Ott's crimes, and to present the "Meet Lacey Lawrence" recording. The case was a death penalty case at that point; it was only in the midst of jury selection that the prosecution withdrew death as a sentencing option in exchange for Ott's Alford plea (R. 1121-1133, 1135). The fact that death was later removed as a sentencing option after counsel should have sought and obtained a ruling excluding the improper victim impact evidence does not factor into the deficient performance analysis of counsel's performance when Ott was facing the death penalty. See Strickland, 466 U.S. at 689.

Ott was prejudiced by trial counsel's failure to obtain a ruling excluding the victim opinion evidence, regardless of the removal of death as a sentencing option in the plea bargain. At the time of trial, Utah law limited victim opinion evidence from penalty phase trials, regardless of the removal of death as a sentencing option.[17] Given the legal context prevailing at the time of trial, it is not reasonable

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[17]The Utah statute governing all capital sentencing proceedings limited the presentation of victim impact evidence and did not permit the admission of victim opinion evidence, regardless of whether death or life without parole was the maximum potential penalty. It indicated that evidence may be admitted concerning "the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims[.]" Utah Code Ann. § 76-3-207 (2)(a)(iii). Under Utah law, the fact that the statute specified the types of victim impact evidence which were admissible is read as a legislative exclusion of other types of victim impact evidence. See, e.g. Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (recognizing the maxim of statutory construction, *expressio unius est exclusio alterius*," which means the expression of one thing implies the exclusion of another).

Well before Ott's trial, law from the Utah Supreme Court recognized the dangers posed by victim impact evidence, and suggested that the admission of such

to speculate that the trial court or even the prosecutor would have risked reversal by admitting or presenting this evidence once the plea bargain was struck. Rather, the reasonable likelihoods are that had trial counsel fulfilled their obligations to prepare for Ott's trial and assert his legal rights consistently with the defense theory of the case, the trial court would have maintained the pretrial order excluding victim impact evidence after the plea bargain was struck, and that at least one more juror would have voted for a sentence less harsh than life without parole. Ott was thus prejudiced by trial counsel's objectively deficient performance.[18] Because Ott is correctly decided, this Court should deny certiorari.

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evidence might be found to violate the Utah Constitution. See State v. Carter, 888 P.2d 629, 650-53 and accompanying notes (Utah), cert. denied, 516 U.S. 858 (1995). Cf. State v. Kell, 2002 UT 106, at ¶ 53 n.17, 61 P.3d 1019 (finding the admission of victim impact evidence harmless but citing with approval State v. Muhammad, 678 A.2d 164 (N.J. 1996), which carefully circumscribed the admission of this evidence so that unduly prejudicial victim impact evidence is not admitted).

At the time of this trial, Fourteenth Amendment authorities barred verdicts resulting from unfair prejudice, and were not limited in application to death penalty cases. E.g. Donnelly v. DeChristoforo, 416 U.S. 637 (1974). The victim opinion testimony and much of the victim impact evidence at issue in this case were unfairly prejudicial, and would have been subject to the Fourteenth Amendment bar, regardless of which sentence was at issue. Cf. id.

Victims' family members' personal opinions concerning the defendants, the crimes and sentences are excluded because they are not truly probative, but instead tend to result in sentences based on caprice or emotion. See Booth, 482 U.S. at 508-09. Utah law calls for the exclusion of highly prejudicial evidence which is lacking in probative value. See, e.g., Utah Rule of Evidence 403.

[18]See Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring proof of prejudice: "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."); Wiggins v. Smith, 539 U.S. 510, 537 (2003) (reversing capital sentence for ineffective assistance after concluding that if the defense case had been handled competently, there was "a reasonable probability that at least one juror would have struck a different

II. THIS COURT SHOULD NOT CONSIDER OVERRULING BOOTH IN THIS CASE.

A. THERE IS NO QUANDARY OVER THE LAW OF BOOTH, WHICH HAS BEEN SETTLED FOR OVER TWENTY-THREE YEARS.

The State argues as if Payne opened a constitutional question that has been left open for two decades concerning the admissibility of victim opinion evidence in capital penalty phase trials. State's petition at 15. As the State's petition demonstrates, the vast majority of courts in this country have been following Booth since it was written twenty-three years ago, and have not read Payne's overruling of a portion of Booth as a total overruling of Booth. State's Petition at 24-25 (citing cases). The courts are correct in this regard, because once this Court answers a constitutional question, the question is no longer open.[19]

The State argues that case law from Oklahoma demonstrates that the lower courts are confused by this Court's jurisprudence. State's petition at 12-13, 25-27.[20] Oklahoma, like Booth and Ott, bars victim opinion evidence about the defendants,

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balance.").

[19]See, e.g., Rivers v. Roadway Exp. Inc., 511 U.S. 298, 312-313 (1994) (lower courts must respect this Court's interpretation of the law).

[20]In arguing that the lower courts are confused because Booth did not involve sentencing recommendations, but Payne interpreted Booth incorrectly as if it did, the Amicus relies solely on Oklahoma law as reflecting this purported confusion. See Amicus brief at 11-12. Oklahoma's case law does not reflect the confusion asserted by the Amicus, but instead ambivalently reads Payne as if it overruled Booth completely. See, e.g., Murphy v. State, 47 P.3d 876, 885 (Okla. Crim. App. 2002), cert. denied, 438 U.S. 985 (2003).

the crimes, and the appropriate sentences when the prejudicial effect of such evidence outweighs its probative value, albeit under the Due Process Clause of the Fourteenth Amendment and state law.[21] The Oklahoma court has held that it was error to admit victim opinion evidence that was similar to or less egregious than that requiring reversal in Ott.[22] Thus, consistent with Booth and Ott, albeit with different jurisprudential underpinnings, Oklahoma would have found error in the admission of the opinion evidence such as caused the reversal here. The similarity in ultimate outcomes may be one reason the Court has denied certiorari in the Oklahoma cases.[23]

In the event Oklahoma's views of Booth did produce divergent outcomes, federal habeas is the remedy designed to correct such errors. The Tenth Circuit properly reads Booth as controlling precedent in cases involving victim's family members' opinions about the defendant, crime and appropriate penalty. See, e.g., Hain v. Gibson, 287 F.3d 1224,1237-39 (10th Cir. 2002). The Tenth Circuit is fully

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[21]See Ledbetter v. State, 933 P.2d 880, 890-91 (Okl. Crim.), cert. denied, 525 U.S. 1057 (1998), and Turrentine v. State, 965 P.2d 955, 980-81 (Okl. Crim.), cert. denied, 525 U.S. 1057 (1998).

[22]See Ledbetter v. State, *supra*, 933 P.2d at 891 (recognizing error in admission of opinions that crime was "brutal," a "selfish act," that the victim was "butchered like an animal," and statement that the victim's child "somehow knew" in his or her "heart that he meant it" when he threatened to kill child's mother), and Turrentine v. State, *supra*, 965 P.2d at 981 (recognizing error in admission of opinion that crime was "brutal").

[23]See Ledbetter and Turrentine, *supra*, and Murphy v. State, 47 P.3d 876 (Okla. Crim. App.) (2002), cert. denied, 538 U.S. 985 (2003).

able to review and correct Oklahoma's interpretations of Booth and Payne. See Hain v. Gibson, *supra*, and Hooper v. Mullin, 314 F.3d 1162, 1174 (10th Cir. 2002).

Assuming that this Court wishes to correct Oklahoma, this case would not serve as an efficient means to do so, because as Ott demonstrates, Utah honors this Court's authority as expressed in Booth and Payne.[24]

Because there is no meaningful confusion or disagreement in the lower courts regarding the precedential value of Booth, this Court should deny certiorari in this case.

B. THERE IS NO COMPELLING REASON TO REVISIT BOOTH.

The doctrine of *stare decisis*, under which the Court continues to honor its prior precedents, is valuable because it promotes the stability of our legal system and respect for the opinions of the Court. See, e.g., Lawrence v. Texas, 539 U.S. 558, 577 (2003). In deciding whether to adhere to *stare decisis*, the Court considers the workability of the precedent at issue, whether it was premised on a sound rationale, the extent to which the precedent is relied on, and the age of the precedent. See, e.g., Citizens United v. Federal Election Com'n., 130 S.Ct. 876, 911-12 (2010). The Court's "precedent is to be respected unless the most convincing of reasons demonstrates that adherence to it puts [the Court] on a course that is sure error." Id. There is no such convincing reason to justify reconsideration of Booth.

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[24]See Pet. App. at 15-16 (recognizing that Booth retains its viability after Payne with regard to victim's family members' opinions regarding the defendant's character and crime and the sentence he should receive).

Over twenty-three years ago in Booth, a death penalty case, the Court held that victims' family members' opinions and characterizations of the defendants and their crimes, and opinions as to appropriate sentences were inadmissible in capital penalty phase trials. 482 U.S. at 508-09.[25] The rationale for the holding was sound: such opinions are not truly evidence, and do not illuminate the unique sentencing inquiry in capital penalty phase trials, which should focus on the circumstances of the crime, the history and record of those accused, and their moral culpability. Id. at 502. Rather, such opinions tend to divert the jurors from the proper inquiry, inflame their emotions, and result in verdicts which are not based on reason. Id. at 508-09. The dissenting Justices in Booth did not take issue with the victim opinion aspect of the opinion. Rather, Justices White and Scalia both objected to the portion of Booth excluding evidence of the impact of the crime, the portion that was later overruled in Payne v. Tennessee. Justice White's dissent, joined by then-Chief Justice Rehnquist, Justice O'Connor, and Justice Scalia, argued that the

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[25]The Amicus complains that Booth did not involve victims' family members' sentencing recommendations, and that Payne mis spoke and caused confusion in the lower courts in reading Booth as forbidding victims' family member to give sentencing recommendations in capital cases. Amicus brief at 2-13. Booth actually did involve this very type of evidence. See 482 U.S. 496, at 508 (daughter of murder victims testified that she did not believe the defendants could be rehabilitated, and did believe that they ought not to be able to repeat their crimes; son of murder victims testified that he did not believe the defendants should be able to get away with doing something like they did). Thus, Payne properly recognized the continuing validity of Booth's proscription of this type of evidence. See Payne, 501 U.S. 808, at 830 n.2 (majority opinion); id. at 833 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy); and at 835 n.1 (concurring opinion of Justice Souter, joined by Justice Kennedy).

Maryland state legislature was within constitutional bounds in codifying that the extent of criminal punishment could account for the extent of harm caused by the defendant's crimes. Id. at 515-16. He argued that capital jurors should be acquainted with the victims and the unique loss their deaths caused to their families and communities, to counterbalance the jurors' learning of the individual circumstances of the defendants in capital penalty phase trials. Id. at 516-17. However, consistent with the enduring holding of Booth, Justice White's dissent suggested that to the degree that victims' family members opinions on issues such as the defendant's potential for rehabilitation were inadmissible, this should not bar the evidence of the impact of the defendant's crimes. See id. at 518-19. Justice Scalia's separate dissent, joined by then-Chief Justice Rehnquist, Justice White and Justice O'Connor, criticized the rational of Booth's victim impact holding, that death penalty analysis should focus on moral culpability and exclude consideration of evidence of the magnitude of the harm caused. Id. at 519-21. Justice Scalia's opinion echoed the principle of federalism recognized in Justice White's opinion in explaining that the state legislature had the authority to adopt the position asserted by the victims' rights movement that the full extent of suffering caused by the defendant should be considered in capital penalty phase trials. Id. at 520. Justice Scalia's opinion did not criticize or challenge Booth's other holding that victims' family members' opinions and characterizations of the defendants and their crimes and opinions as to appropriate sentences were not admissible evidence in capital penalty phase trials under the Eighth Amendment.

In adopting the Booth dissenting Justices' positions in Payne, the Court overruled only that portion of Booth which limited the presentation of victim impact evidence, and recognized that states are within their rights to permit the presentation of evidence concerning the extent of harm caused by the defendants' crimes in capital penalty phase trials. See Payne, 501 U.S. at 817-827. The Court left intact the portion of Booth recognizing that victim opinions regarding the defendants, crimes and appropriate punishment were constitutionally inadmissible.[26]

As the State's petition and this brief confirm, the lower state and federal courts have been adhering to and relying on Booth's proscription of victim opinion evidence in capital cases for nearly a quarter of a century. Over time, Booth has proven to be a workable standard because the underlying rationale is sound: capital penalty phase juries should mete out the drastic sentences involved in capital cases on the basis of evidence focused on the defendants and the circumstances of their crimes, and should not be diverted from or tainted in that difficult inquiry by inflammatory victim opinion evidence. See Booth, *supra*. Because adhering to Booth does not put this Court on a course headed toward "sure error," the Court should maintain Booth. See Citizens United, *supra*.

C. IF THE COURT WERE INCLINED TO RECONSIDER BOOTH'S HOLDING ON VICTIM OPINION EVIDENCE, THE

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[26]See Payne, 501 U.S. at 830 n.2 (majority opinion); id. at 833 (concurring opinion of Justice O'Connor, joined by Justices White and Kennedy); and at 835 n.1 (concurring opinion of Justice Souter, joined by Justice Kennedy).

COURT SHOULD AWAIT AN APPROPRIATE CASE.

The State's petition gives the incorrect impression that the Utah Supreme Court's holding was based solely on Booth, and does not mention its actual holding based on Strickland and the law of ineffective assistance of counsel. See State's petition at 10.[27] The questions framed in the State's petition similarly sidestep the fact that Ott is a Sixth Amendment case holding that trial counsel were constitutionally ineffective in failing to oppose the admission of victim opinion testimony.[28]

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[27]In quoting the Utah Supreme Court's conclusion as to prejudice, the State omits the traditional language from Strickland, which requires proof of a reasonable probability of a different result, which is explained as an undermining of the court's confidence in the outcome, see id, 466 U.S. 668, 694 (1984). Compare State's petition at 11 ("The court concluded that 'but for the admission of the victim impact evidence that addressed Mr. Ott's character and the victims' opinions of the appropriate sentence, Mr. Ott would have received a more favorable sentence.' App. 27.") with Ott, 2010 UT 1, ¶ 41 ("[T]here is a reasonable probability that but for the admission of the victim impact evidence that addressed Mr. Ott's character and the victims' opinions of the appropriate sentence, Mr. Ott would have received a more favorable sentence. The admission of the evidence sufficiently undermines our confidence in Mr. Ott's sentence.").

[28]The State's failure to accurately identify the questions to be addressed on certiorari is an independent basis for denying its petition. Consistent with this Court's own interest in its judicial economy, subsection (1)(a) of this Court's rule 14 indicates that the Court will consider on certiorari only those questions raised in certiorari petition or fairly included therein. See id. Questions which are related or complementary are not considered fairly included. See, e.g., Yee v. Escondido, 503 U.S. 519, 537 (1992) (question as to whether statute effected a physical taking did not encompass question as to whether it effected a regulatory taking). Questions which require separate factual and legal analyses from stated questions are not considered fairly included. See Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Phillips Corp., 510 U.S. 27, 30-31 (1994) (*per curiam*) (certiorari improvidently granted because Court could not reach merits without addressing issues which were not raised or fairly included in questions presented in certiorari petition).

Ott is a Sixth Amendment case which presents a far less than ideal context for reconsideration of Booth's Eighth Amendment holding regarding victim opinion testimony. The State's petition should be denied because, as a result of the clear and repeated violations of his Sixth Amendment rights, Ott would be entitled to reversal even if Booth were overruled. The inadmissibility of the victim opinion and impact evidence undermining Ott's sentence under Utah law and the Fourteenth Amendment are additional reasons Ott would be entitled to relief without regard to the Court's revisitation of Booth.[29]

1. The Sixth Amendment Violations Would Merit Relief Regardless of the Court's Reconsideration of Booth.

Ott is entitled to reversal of his sentence and ultimately his convictions as a result of three interrelated Sixth Amendment violations: trial counsel's constitutional ineffectiveness, trial counsel's actual conflict of interest and its adverse effects on counsel's representation of Ott, and prejudicial governmental intrusion into Ott's right to counsel.

The Sixth Amendment provides the accused with the right to the "Assistance of Counsel for his defence." This right is essential to the fairness of criminal trials and the reliability of the verdicts in our adversary system. See, e.g., United States

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[29]The Amicus seeks a limited review of Booth's holding regarding victim opinions as to appropriate sentences, but does not seek review of whether Booth should continue to bar victim opinions on the defendants and their crimes. See Amicus brief *passim*. Because Ott's reversal hinges as much or more on the latter type of victim opinions as it does on their opinions as to the appropriate sentence, the grant of certiorari sought by the Amicus would not result in reversal.

v. Cronic, 466 U.S. 648, 658 (1984). An ineffective assistance claim has two components. First, Ott must identify the specific acts or omissions he claims fell below an objective standard of reasonableness in the context of the law prevailing at the time of trial, without the distorting effects of hindsight. Strickland v. Washington, 466 U.S. 668, 687-88, 690 (1984). Second, Ott must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 687. Trial counsel's failure to investigate the underlying facts and mitigation evidence, mishandling of Ott's competency and mental health issues, failure to investigate and present evidence of Ott's bipolar disorder, PTSD and brain damage, failure to object to anonymous jury proceedings, agreement to withhold key evidence from the appellate record despite its admission for the jurors during the penalty phase, and filing of a tardy and inadequate challenge to the life without parole statute are repeated examples of objectively deficient and prejudicial performance of trial counsel. See, e.g., Ott's opening brief at 24-113. They likewise evince adverse effects of trial counsel's actual conflict of interest and in some instances also prove prejudicial governmental intrusion into Ott's Sixth Amendment right to counsel, discussed *infra*. See id.

The Sixth Amendment right to counsel is violated by governmental intrusion into the attorney-client relationship if the intrusion was prejudicial. See, e.g., Weatherford v. Bursey, 429 U.S. 545, 558 (1977). Four factors guide the prejudice inquiry when government intrusion occurs: whether governmental intrusion was purposeful, whether evidence offered at trial resulted directly or indirectly from

that intrusion, whether the intrusion resulted in the prosecutor's being privy to the defense strategy or preparation, and whether the defendant was substantially harmed in any other way by the intrusion. Id. at 554.

When criminal defense lawyers operate under conflicts of interest, they breach "the duty of loyalty, perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668, 692 (1984). Conflicts of interest derogate the entire adversarial process in ways that may not be reflected on the face of the record, from trial preparation, to plea bargaining, to formulation of trial strategy, to trial performance, and so on. See, e.g., Holloway v. Arkansas, 435 U.S. 475, 488-91 (1978) (involving representation of multiple clients by one lawyer).

Traditional harmless error analysis does not apply to Sixth Amendment violations which pervade criminal cases. See, e.g., Satterwhite v. Texas, 486 U.S. 249, 256 (1988). Prejudice is presumed in the conflict of interest context because lawyers have professional obligations to avoid conflicts of interest and because courts have the ability to inquire into such conflicts. Strickland, 466 U.S. at 692 (citing Fed. Rule Crim. Proc. 44(c)). Finally, prejudice is presumed because conflicts borne by defense counsel often influence lawyers not to do things which would disserve the conflicting interests, and thus the record is often lacking in evidence as a result of the conflict, obfuscating a traditional evidentiary prejudice inquiry. See, e.g., Holloway v. Arkansas, 435 U.S. 475, 488-91 (1978) (involving representation of multiple clients by one lawyer).

Wood v. Georgia, 450 U.S. 261 (1981), is analogous to the present case,

wherein trial counsel was beholden to the prosecutor, his personal and longtime friend, who not only was instrumental in trial counsel's being hired to serve as appointed counsel for Ott, but also, hired trial counsel for an undetermined contingency fee in the prosecutor's wife's unrelated civil suit which they were jointly litigating simultaneously to Ott's prosecution. Wood involved probationers whose cases were accepted on certiorari. The Court did not address the issue for which certiorari was granted, but remanded the case to the trial court to inquire into the apparent due process violation posed by the fact that the defendants' lawyer was being paid by the defendants' employer, whose interests were adverse to the defendants' in the probation revocation proceedings. Id. at 264-66. The defendants were convicted of distributing pornography, and the record reflected that their employer had an agreement with the employees to pay attorney fees, bonds, and fines. Id. at 266. The employer honored the agreement to a point, but then did not pay the fines underlying the probation revocation order. The Court suspected the employer's failure to pay might have been an effort to establish constitutional precedent alleviating the need for the employer to pay the employees' fines in the future. Id. at 267. The Court recognized that the attorney's employment by the defendants' employer may well have created a conflict of interest which resulted in the lawyer's failure to protect the defendants from probation revocation. Id., 450 U.S. at 267-68 and n.14.

While Wood involved an attorney representing multiple defendants, it focused on the conflict problems posed by third party payment of attorneys, such as

when the payor prevents the lawyer from presenting evidence which might be used to defend the accused but which might reflect badly on the payor. Id. at 269-71 and accompanying notes. The Court held that the potential conflict of interest posed by the lawyer's employment by the defendants' employer was sufficiently clear in Wood that the trial court should have recognized it and inquired into it. Id. at 272.

In Mickens v. Taylor, 535 U.S. 162 (2002), the Court explained that "actual conflict of interest," which requires automatic reversal, is established if "'counsel [were] influenced in [their] basic strategic decisions by the interests of the employer who hired [them]'" or if a conflict of interest adversely affected that attorney's performance. Mickens, 535 U.S. at 172, quoting Wood, 450 U.S. at 170-72. As examples of adverse effect, the Court referred to a lawyer's failing to cross-examine an adverse witness or failing to object to inadmissible evidence. Id. Traditional evidentiary prejudice under Strickland v. Washington need not be shown if an actual conflict of interest is present. Id.

Consistent with Wood and Mickens, an actual conflict of interest is properly recognized as a result of a criminal defense attorney's "social, professional and financial relationship" with the prosecutor, and will justify the presumption of prejudice, provided that there is proof of adverse effect on the defense attorney's performance.[30]

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[30]See Patterson v. Virginia Department of Corrections, 172 F.3d 44 at *3 (4th Cir. 1998) (unpublished opinion) (recognizing that an actual conflict of interest might stem from trial counsel's "social, financial and professional relationship with the prosecutor," but finding that there was no adverse effect to prove the Sixth

Ott's appointed lead trial counsel, Caine, labored under an actual conflict of interest stemming from his thirty year friendship with the prosecutor, Wilson, and his wife, from Caine's simultaneous representation of Ott and the prosecutor's wife in the civil suit wherein he was working with the prosecutor to earn a then-undetermined contingency fee, and from the prosecutor's facilitating trial counsel's appointment to represent Ott without revealing the conflict. See n.5, *supra*.

The conflict of interest influenced trial counsel's basic strategic decisions and adversely affected his performance in many ways, and also allowed governmental intrusion into and interference with Ott's Sixth Amendment rights. Caine pled Ott guilty to aggravated murder in an agreement purporting to foreclose all judicial review of the plea after sentencing (R. 1130).[31] Utah law in effect at the time of the plea strongly indicated that Ott's accidental homicide of Lacey Lawrence did not constitute aggravated murder.[32] Caine and Wilson actively litigated the Wilsons' civil suit during Ott's prosecution; the day after pleading Ott guilty to capital murder for a crime that apparently was not capital in an agreement that purported

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Amendment violation).

[31] But see, e.g., Utah Code Ann. § 77-13-6 (authorizing challenges to pleas through the Post Conviction Remedies Act); Constitution of Utah Article I § 5 ("The privilege of the writ of habeas corpus shall not be suspended, unless, in case of rebellion or invasion, the public safety requires it."); Julian v. State, 966 P.2d 249, 253 (Utah 1998) (recognizing the writ as the greatest protector of individual liberty, as requiring the Courts to "maintain their fundamental power to "guarantee fairness and equity in particular cases.").

[32] See Pet. App. at 7, 9-11; State v. Thurman, 911 P.2d 371 (Utah 1996) (conviction of aggravated murder requires proof of knowing and intentional killing).

to shield the agreement from judicial scrutiny, Caine filed a memorandum opposing a motion to dismiss the civil suit (R. 2166: 33).

Wilson testified that Caine discussed defense strategy with Wilson in reaching the agreement concerning the defense mental health expert, who was called at the last minute without time to prepare and without the filing of the statutorily-required notice. Wilson and Caine agreed that Caine would not ask the expert questions concerning how Ott's mental illness may have influenced his behavior or ability to control himself during the offenses (R. 1378:53-55; R2166:89). In the 23B remand hearing incident to the appeal, once the expert was given the necessary information and time to review it, he was able to explain how Ott's bipolar disorder, traumatic brain injuries, PTSD, and improperly prescribed medications likely caused him to misperceive that he was being attacked when Lawrence grabbed him from behind when he entered the bedroom, and to then lose control and react with extreme and excessive rage and violence without being able to curb his response or understand its excessiveness or the unlawfulness of his conduct (R2166:106-113).[33]

Caine and Wilson agreed between themselves to play the "Meet Lacey Lawrence" recording for the jury (R. 1377: 7). They also agreed to exclude the "Meet Lacey Lawrence" recording from the record that would be the foundation of Ott's

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[33]Trial lawyers are duty bound to make reasonable investigations into the facts and the law, and cannot make valid strategic decisions absent reasonably necessary and thorough investigation of the facts and the law. See Strickland v. Washington, 466 U.S. at 690.

appeal of right (R. 1377: 7).[14] This course of action dis-served Ott's interests and instead served those of the prosecutor, trial counsel's dear friend and employer. It is perhaps the clearest example of adverse effect of the conflict. See Wood and Mickens, *supra*. The foregoing Sixth Amendment violations would require reversal regardless of the Court's reconsideration of Booth.

2. The Inadmissibility of the Victim Impact Evidence under Utah Law Would Merit Relief Regardless of the Court's Reconsideration of Booth.

Were this Court to overturn Booth or the Utah Supreme Court's application of Booth in Ott's case, the substantial likelihood is that the Utah Supreme Court would nonetheless order Ott's sentence reversed because the victim opinion testimony and other victim impact evidence violated Utah law and the Fourteenth Amendment and trial counsel were constitutionally ineffective in failing to file a motion in limine or otherwise oppose its admission.

The Utah statute governing all capital sentencing procedures, including both those wherein death or life without parole was the maximum potential penalty, did not permit the admission of victim opinions such as caused Ott's sentence to be reversed. Rather, the statute indicated that evidence could be admitted concerning

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[14]Trial lawyers in capital cases have the obligation to protect the record so that it is fully available for review of the state and federal appellate courts. See ABA Guideline 10.7(B)(2) and 10.8(B)(2) (requiring capital lawyers to insure that the record is complete and supplement it when necessary); Strickland, *supra* (requiring courts to assess prejudice on the basis of the entire evidentiary picture). A complete record is essential to effectuating Ott's rights to judicial review, for if the record is incomplete, the courts may disregard issues, regardless of their merit. See, e.g., Horton v. Green Mut., 794 P.2d 847, 849 (Utah App. 1990).

"the victim and the impact of the crime on the victim's family and community without comparison to other persons or victims[.]" Utah Code Ann. § 76-3-207 (2)(a)(ii). Under Utah law, the fact that the statute specified the types of victim impact evidence which were admissible implies that the legislature intended to exclude the types not mentioned, such as victims' family members' opinions of the defendants, their crimes and the appropriate sentences.[35]

Assuming that the victim opinion testimony did not violate the Utah statute, as tacitly indicated in the concurring opinion of Chief Justice Durham, the evidence and statute itself would be subject to a strong state constitutional challenge. See Pet. App. at 32-33 (concurring opinion of Chief Justice Durham, joined by Justice Parrish). The Utah Supreme Court has independently recognized the dangers posed by victim impact evidence, and has suggested that the admission of such evidence might be found to violate the Utah Constitution.[36] In Ott's case, the Utah Supreme Court reserved this question. See Pet. App. at 14 n.3. In the event

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[35] See, e.g. Field v. Boyer Co., L.C., 952 P.2d 1078 (Utah 1998) (recognizing the maxim of statutory construction, *expressio unius est exclusio alterius*," which means the expression of one thing implies the exclusion of another); Hansen v. Wilkinson, 658 P.2d 1216, 1217 (Utah 1983) ("It probably is not wholly inaccurate to suppose that ordinarily when people say one thing they do not mean something else.") (quoting 2a C. Sands, *Sutherland Statutory Construction*, § 47.01 (4th ed. 1973)).

[36] See State v. Carter, 888 P.2d 629, 650-53 and accompanying notes (Utah), cert. denied, 516 U.S. 858 (1995). Cf. State v. Kell, 2002 UT 106, at ¶ 53 n.17, 61 P.3d 1019 (finding the admission of victim impact evidence harmless but citing with approval State v. Muhammad, 678 A.2d 164 (N.J. 1996), which carefully circumscribes the admission of this evidence so that unduly prejudicial victim impact evidence is not admitted).

3. The Inadmissibility of Victim Impact Evidence under the Fourteenth Amendment Would Merit Relief Regardless of the Court's Reconsideration of Booth.

In the event this Court overruled Booth or found it inapplicable to Ott's case, the Fourteenth Amendment would be another basis upon which the Utah Supreme Court might well rely in reversing Ott's sentence for ineffective assistance of counsel. In Payne, the Court recognized that if victim impact evidence is "so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief." Payne, 501 U.S. 808, 825 (1991). The Fourteenth Amendment law to this effect is not limited in application to death penalty cases. E.g., Donnelly v. DeChristoforo, 416 U.S. 637 (1974).

In Ott's case, with the assent of trial counsel, the State played "Meet Lacey Lawrence" for the jury. This is a powerfully moving six minute movie of Lacey and her loved ones sharing the milestones in Lacey's life. It begins with her as a baby being held, fed and bathed by her family members, crawling, rolling over, and walking. It shows her as a small child attending parties, celebrating Christmas, singing "Happy Birthday," blowing out candles, eating birthday cake, smiling, playing, riding a horse with her father, and dancing. It also depicts what appears to be her artwork, including her drawing of a little girl in bed, and her writing of, "I love you Mommy" amidst raindrops or teardrops. It ends with the dates of her birth and death, showing that she died two weeks before her seventh birthday (R1376:172). It is set to "You'll Always Be a Part of Me," sung by Billy Joel and "It's

a Wonderful World," sung by Louis Armstrong.

The State came very close to conceding that the "Meet Lacey Lawrence" video violated the Fourteenth Amendment. State's memorandum opposing 23B remand at 26-29; State's brief at 61-62. At oral argument, counsel for the State conceded that under Payne, the "Meet Lacey Lawrence" recording probably caused the most concern, and that the musical accompaniment to the recording may have been so unduly prejudicial as to have rendered the trial fundamentally unfair under the Due Process Clause, although counsel for the State did not think it did.[38]

The "Meet Lacey Lawrence" presentation violated the Due Process Clause of the Fourteenth Amendment. See Payne. As Justice Stevens aptly observed in his opinion respecting the Court's denial of certiorari in Kelly v. California, 129 S.Ct. 564 (2008), a case involving the presentation of similar recordings,

> Victim impact evidence is powerful in any form. But in each of these cases, the evidence was especially prejudicial. Although the video shown to each jury was emotionally evocative, it was not probative of the culpability or character of the offender or the circumstances of the offense. Nor was the evidence particularly probative of the impact of the crimes on the victims' family members: The pictures and video footage shown to the juries portrayed events that occurred long before the respective crimes were committed and that bore no direct relation to the effect of crime on the victims' family members.
>
> Equally troubling is the form in which the evidence was presented. As these cases demonstrate, when victim impact evidence is enhanced with music, photographs, or video footage, the risk of unfair prejudice quickly becomes overwhelming. While the video tributes at issue in these cases contained moving portrayals of the lives of the

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[38]May 2008 oral arguments found at http://www.utcourts.gov/courts/sup/streams/ at approximately at minutes 31 through 37.

> victims, their primary, if not sole, effect was to rouse jurors' sympathy for the victims and increase jurors' antipathy for the capital defendants. The videos added nothing relevant to the jury's deliberations and invited a verdict based on sentiment, rather than reasoned judgment.

Id. at 567 (footnote omitted).

The recording and much of the testimony of Lacey's family members were undoubtedly greatly distressing for the jurors to experience, and most probably left them feeling obligated to somehow compensate these people with the only thing the jurors were in a position to give -- a sentence of life in prison without parole. Particularly because Ott had no idea Lacey was present when he set the fire, his sentence should not turn on her family members' opinions of him and his crimes, and their desires as to his sentence. Because the victim impact evidence in this case undermined the fairness of Ott's sentencing proceeding,[39] the Fourteenth Amendment would be an additional alternative basis upon which this Court might rely in affirming the Utah Supreme Court's judgment.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted this 12th day of January, 2011.

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[39]The State and the Amicus are not challenging the Ott court's assessment of prejudice from the testimony that caused the reversal.

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No. 10-490

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In The
Supreme Court of the United States

STATE OF UTAH,

Petitioner,

vs.

MARK ANTHONY OTT,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

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REPLY BRIEF FOR THE STATE OF UTAH

The Utah Supreme Court squarely decided an issue that this Court expressly left unresolved in *Payne v. Tennessee* two decades ago: whether the Eighth Amendment –without exception – continues to bar victims from offering an opinion on the crime, defendant's character, and sentence in a capital sentencing proceeding. Contrary to Respondent's contentions, this case presents an excellent vehicle for resolving that issue. This Court should resolve the issue because its continuing silence has hamstrung the States' ability to admit such evidence, even when that evidence is relevant and consistent with Due Process.

This Court should also resolve whether *Booth* should apply to a sentencing proceeding in which death is not an option. Contrary to Respondent's claim, the issue was presented to and passed upon by the Utah court. The Utah court's decision applying *Booth* casts constitutional doubt on the laws and constitutions of the many States that afford victims the right to voice their opinions on the defendant's character, crime, and appropriate sentence in non-capital sentencing proceedings.

1. This case presents an excellent vehicle for revisiting the remaining vestige of *Booth*.

With respect to the first question presented, Respondent contends that this case is not an appropriate vehicle for revisiting *Booth*, because the victim

evidence issue was raised below as an ineffective assistance of counsel claim. This, Respondent contends, would prevent this Court from cleanly reaching the merits of *Booth*. Br. Opp. at 26-28.

While it is true that Respondent raised this claim under ineffective assistance of counsel, the Utah court's resolution of the claim rested solely on *Booth*'s *per se* bar to a victim's opinions about the crime, defendant, and appropriate sentence. This case, therefore, presents an ideal vehicle for addressing the remaining vestige of *Booth*.

Before addressing whether counsel performed deficiently in not objecting to the victim evidence, the Utah Supreme Court addressed whether the victim evidence was admissible in the first place. App. at 13-16. The Utah court held that under *Booth*, the Eighth Amendment clearly imposed a blanket ban to the evidence. App. at 15-16. The Utah court concluded that because the evidence was *per se* inadmissible under *Booth*, trial counsel performed deficiently by not objecting to it: "Specifically, we hold that counsel was objectively deficient for failing to object to victim impact evidence that addressed Mr. Ott's character, chances for rehabilitation, and deserved sentence *because such victim impact evidence clearly violates the Eighth Amendment when introduced in capital sentencing hearings*." App. at 32 (emphasis added). *See also* App. at 26 ("A decision not to object to the victim impact evidence, especially when the evidence violated existing precedent prohibiting victims expressing opinions about the sentence or the defendant's

character, falls below the line of objective reason and therefore amounts to ineffective assistance of counsel.").

The Utah court's conclusion that trial counsel was ineffective thus rises and falls on the continuing viability of *Booth*'s blanket proscription on a victim's opinions about the crime, defendant, and appropriate sentence. Accordingly, the petition presents a perfect – and clean – opportunity for this Court to revisit *Booth* and its Eighth Amendment underpinnings.[1]

2. This Court's continuing silence has hamstrung the States' ability to admit relevant evidence in capital sentencing proceedings.

Respondent argues that because "the vast majority of courts in this country have been following *Booth*" for the past 23 years, there is no open question or confusion. Br. Opp. at 21-23. That misses the point. Lower courts have, of course, felt bound by that part of *Booth* not overruled in *Payne*. Only this Court can eliminate the unwarranted ban on victim statements

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[1] Respondent also suggests that he was entitled to reversal based on other "interrelated" ineffective assistance of counsel claims, including a failure to object to a videotape celebrating the child victim's life. Br. Opp. at 28-34. But the Utah Supreme Court did not reverse on those other claims. *See* App. at 13-14 & n.3. It reversed only on *Booth*'s *per se* bar on victim evidence. App. at 13-16, 26, 31-32. Whether or not Respondent might be entitled to reversal on other grounds is thus irrelevant to whether this Court should grant the petition.

regarding the defendant's character, crime, and appropriate sentence.

This Court should remove that blanket ban because it unfairly and indiscriminately excludes evidence relevant to the "*individualized* determination" of whether the death penalty should be imposed. *Booth v. Maryland*, 482 U.S. 496, 502 (1987) (emphasis in original). Most states permit both sides in a capital sentencing proceeding to present evidence of the crime's circumstances; the defendant's character, background, and history; the victim and impact of the crime on the victim's family; and other relevant facts in aggravation or mitigation. *See, e.g.,* Utah Code. Ann. § 76-3-207(2). But while defendants are regularly permitted to put on relevant favorable character evidence through family, friends, employers, and others, *Booth*'s blanket ban excludes relevant unfavorable character evidence when it comes from the defendant's victims. By imposing a blanket ban on this type of evidence merely because it comes from victims, *Booth* unfairly prevents a capital sentencer "from having before it all the information necessary to determine the proper punishment for a first-degree murder." *Payne v. Tennessee*, 501 U.S. 808, 826 (1991).

So long as *Booth* stands, the States are hamstrung in their ability to permit victims from ever offering an opinion on the crime, defendant's character, and sentence, even when those opinions are relevant and consistent with Due Process. For example, Arizona has enacted a statute that expressly permits

victims to make such statements in death penalty sentencing proceedings. *See* Ariz. Rev. Stat. Ann. § 13-4426. Yet, in apparent recognition of *Booth*'s blanket ban, that enactment is conditional and takes place only if on or before June 30, 2013, this Court or the Arizona Supreme Court holds that it is constitutionally permissible for a victim in a capital case to make a sentencing recommendation. *See id.* (Historical and Statutory Notes); *see also* 2003 Ariz. Sess. Laws, ch. 255, ¶¶ 7-8. Thus, until this Court breaks its silence on the remaining vestige of *Booth*, no state is free to enact or enforce a statute that permits what would otherwise be relevant and constitutionally permissible evidence. *See, e.g.,* N.H. Rev. Stat. Ann. § 651:4-a (permitting victims to give opinion evidence and sentencing recommendations in death penalty sentencing proceedings).

Moreover, contrary to Respondent's claim, there is deep split between Oklahoma and the Tenth Circuit that this Court should resolve. Respondent downplays the split by suggesting that "federal habeas is the remedy designed to correct such errors," as those committed by the Oklahoma courts in interpreting *Booth* and *Payne*. Br. Opp. 22. Thus, Respondent reasons, the Tenth Circuit is fully able to review and correct Oklahoma's interpretations of *Booth* and *Payne*. Br. Opp. 22-23.

Respondent overlooks the intractable nature of the split. Oklahoma's reading of *Booth* cannot be reconciled with that of the Tenth Circuit. Oklahoma has concluded that *Payne* overruled all of *Booth*, at

least insofar as *Booth* "had its roots in the Eighth Amendment." *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997). But the Tenth Circuit has concluded on federal habeas review that Oklahoma's conclusion that *Booth* allowed certain victim testimony was "contrary to established Supreme Court precedent." *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002). Notwithstanding the Tenth Circuit's views, the Oklahoma Court of Criminal Appeals has interpreted this Court's repeated denial of petitions raising the issue as implicit approval of its position and has roundly rejected any "contention that our interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002).

And, contrary to Respondent's assumption, a federal circuit court of appeals has no authority to overrule a decision by a state's court of last resort, even on a federal question. Only this Court has that authority. Thus, until this Court speaks to the issue, the irreconcilable split between Oklahoma and the Tenth Circuit will remain.

Respondent suggests that this Court should decline to review *Booth*'s blanket ban in this case because Utah law independently excludes it in capital sentencing proceedings. Br. Opp. at 36. As Respondent concedes, the Utah Supreme Court expressly declined to decide that issue in this case and, instead, rested its decision solely on *Booth*'s blanket ban. *See* App. 13-14. Thus, as explained in footnote 1 above,

whether Respondent might be entitled to relief on those grounds is not relevant to whether this Court should grant certiorari. In any event, Utah law does permit the kind of evidence barred under *Booth* and the lower court's decision. For example, Utah statute expressly permits relevant evidence of "the defendant's character, background, history, and mental and physical condition" to be presented at capital sentencing proceedings, without regard to its source. Utah Code Ann. § 76-3-207(2).

But even assuming that Utah law were co-extensive with *Booth*, that is a reason to grant, not deny, review. As explained, so long as *Booth* stands, states – including Utah – are not free to permit the kind of victim evidence excluded here.

3. The second question presented was properly raised and passed upon below.

With respect to the second question presented – whether *Booth*'s blanket proscription applies to non-death sentencing proceedings – Respondent argues that it was neither timely nor properly presented below. Br. Opp. at 11-13. This Court's "practice," however, 'permit[s] review of an issue not pressed [below] so long as it has been passed upon. . . .'" *Citizens United v. Federal Elections Comm'n*, 130 S.Ct. 876, 892-93 (2010) (quoting *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995)) (additional citation omitted) (alterations in original).

The Utah Supreme Court passed upon the issue, here, when it applied *Booth*'s blanket proscription in a non-death sentencing proceeding, despite *Booth*'s express language that it applied only to death penalty cases. *See Booth*, 482 U.S. at 507 n.7, 508, & 509 n.12. The Utah court also passed upon the issue when it denied the State's timely petition for rehearing pointing out the court's obvious mistake.

Moreover, on certiorari review, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Id.* (quoting *Lebron*, 513 U.S. at 379). The second question presented is not a new claim, but, "at most – 'a new argument to support what has been [a] consistent claim.'" *Citizens United*, 130 S.Ct. at 893 (quoting *Lebron*, 513 U.S. at 379) (alteration in original). The State argued below that counsel's failure to object to the evidence was not unreasonable, where Respondent's authorities were "either inapplicable, adverse, or unsettled with respect to the admissibility of victim impact evidence." State's Brief of Appellee at 60-61. The State then quoted *Payne*: "'evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision *as to whether or not the death penalty should be imposed*.'" *Id.* at 61 (quoting *Payne*, 501 U.S. at 827) (emphasis added). The argument that *Booth*, by its express terms, does not apply to non-death sentencing proceedings, supports the State's consistent claim below that counsel did not perform

deficiently by not moving to exclude the victim evidence, because no law required its exclusion. Thus, whether *Booth* applies to a sentencing hearing in which death is not an option was squarely presented to and passed upon by the lower court.

Respondent finally argues that this Court should deny review on the second question presented because the decision below and other Utah cases hold that *Booth* applies only to "capital sentencing hearings." Br. Opp. at 13. This case, however, was not a capital sentencing proceeding in the ordinary sense of that term. The State agreed to drop the death penalty in exchange for Respondent's plea. Thus, death was not an option at his sentencing proceeding. As explained above and in the Petition, *Booth* expressly limits its holding to cases where the death penalty is at issue. *See* Petition at 27-29.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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STATE OF UTAH,

Petitioner,

v.

MARK ANTHONY OTT,

Respondent.

On Petition For Writ Of Certiorari To The Utah Supreme Court

BRIEF OF *AMICUS CURIAE* THE NATIONAL CRIME VICTIM LAW INSTITUTE SUPPORTING PETITIONER

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INTERESTS OF *AMICUS CURIAE*[1]

The National Crime Victim Law Institute (NCVLI) is a nonprofit educational organization located at Lewis & Clark Law School in Portland, Oregon. NCVLI's mission is to actively promote balance and fairness in the justice system through crime victim-centered legal advocacy, education, and resource sharing. NCVLI accomplishes its mission through education and training; technical assistance to attorneys; promotion of the National Alliance of Victims' Rights Attorneys; and research and analysis of developments in crime victim law. In addition, NCVLI actively participates as *amicus curiae* in cases involving crime victims' rights nationwide. This case involves the fundamental right of all crime victims to be fully heard at sentencing.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* or its counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief and have been given at least 10 days notice of *amicus curiae*'s intention to file it.

REVIEW IS WARRANTED ON THE IMPORTANT QUESTION OF WHETHER THE CONSTITUTION BARS VICTIMS FROM COMMENTING ON THE APPROPRIATE SENTENCE DURING DELIVERY OF THEIR VICTIM IMPACT STATEMENT AT SENTENCING.

REASONS FOR GRANTING THE PETITION

In the case below, the Utah Supreme Court held that it constitutes cruel and unusual punishment for family members of a murder victim to offer their opinion regarding the appropriate sentence for the murderer. The decision squarely presents the question whether the Eighth Amendment erects a *per se* bar against a victim's sentencing recommendation, a question this Court deferred in *Payne v. Tennessee*, 501 U.S. 808 (1991). While *Payne* overruled parts of the Court's earlier opinion in *Booth v. Maryland*, 482 U.S. 496 (1987), barring general victim impact evidence, the Court specifically reserved the question of whether it should likewise overrule that part of *Booth* that the Court described as barring crime victims from delivering opinions on the proper sentence. Despite the characterization in *Payne*, the Court did not have the question of sentencing recommendations squarely presented in *Booth*. Consequently, whether the Eighth Amendment erects such a bar has not been ruled upon and therefore the answer is far from clear.

The ambiguity of the interaction between *Payne*'s overruling of *Booth* and the scope of *Booth*'s original

holding has created significant confusion among lower courts regarding the scope of permissible victim impact statements and has resulted in a split of authorities in the lower courts, as the State of Utah has explained at length in its petition for certiorari. *See also* Elijah Lawrence, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J. L. & FAM. STUDIES 511, 522 (2010) ("The split in authority in the lower courts is apparent. This state of confusion is the result of the U.S. Supreme Court's ambiguous holding in *Booth*, followed by its obfuscating opinion in *Payne*. Some courts are construing the Court's ruling in *Payne* to mean the Eighth Amendment creates a *per se* bar on the admission of victim opinion statements in capital cases."); Wayne A. Logan, *Opining on Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 528 (2000) (reviewing authorities and noting that "it is readily apparent that marked uncertainty now persists over the extent, and indeed the continued existence, of the prohibition [against victim sentencing recommendations] ostensibly established in *Booth*"). Perhaps even more important, this confusion among the lower courts is undermining key aspects of victims' rights codified in all 50 states and the District of Columbia, and impeding legislative action to further develop these rights.[2]

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[2] *See* Douglas E. Beloof, *Weighing Crime Victims' Interests in Judicially Crafted Criminal Procedure*, 56 CATH. U. L. REV. 1135, 1169 (2007) (noting that victims' rights exist in every state

(Continued on following page)

Only this Court can untangle the situation and settle the dispute splitting the courts below. There is no value in letting the conflict continue to percolate because courts on each side have, after expressly considering the alternative, repeatedly stated their conflicting opinions. Further, continuation of the status quo means ongoing deprivation of victims' constitutional and statutory rights to be heard freely, which in turn stymies the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

I. This Court Should Review the Important Question of Whether the Eighth Amendment Erects a *Per Se* Bar Against a Crime Victim Offering a Sentencing Recommendation.

A. The Court's Opinions are the Origin of the Confusion Regarding the Scope of Permissible Victim Impact Statements.

This Court's opinions have created confusion as to whether the States may constitutionally permit a

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by statute, and in more than 30 states by constitutional amendment). These legislative efforts have also included constitutional considerations. A number of recent Congresses have considered, and different Administrations have supported, constitutional amendments to "keep the balance true," *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934), between the rights of victims and those of criminal defendants.

crime victim or crime victim's representative to offer a recommendation on the appropriate sentence to the sentencing judge or jury. The source of this controversy is dictum in a footnote in *Payne v. Tennessee*, 501 U.S. 808 (1991). The Court there held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne*, 501 U.S. at 827. In so holding, the Court clearly and explicitly overruled *Booth v. Maryland*, 482 U.S. 496 (1987), which prohibited the admission of such a victim impact statement.

The Court in *Payne* limited the scope of its decision, however, with the following footnote:

> Our holding today is limited to the holdings of *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989) that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing. *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, and *the appropriate sentence* violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

Payne, 501 U.S. at 830 n.2 (emphasis added). *See also id.* at 833 (O'Connor, J., concurring) ("*Booth* also addressed another kind of victim impact evidence opinions of the victim's family about the crime, the

defendant, and the appropriate sentence. As the Court notes in today's decision, we do not reach this issue as no evidence of this kind was introduced at petitioner's trial.")

The puzzle, however, is that the Court in *Booth* was not presented with, did not address, and therefore could not and did not erect a bar against victims' characterizations about the appropriate sentence. The victim impact statement in *Booth* contained two types of victim information: "First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family. Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." *Booth*, 482 U.S. at 502. The jury was not presented with any victim recommendation for or characterization of the appropriate sentence. There were passing statements from the victims' son that he "doesn't think anyone should be able to do something like that and get away with it" and from the victims' daughter that "she doesn't want them to be able to do this again or put another family through this," *id.* at 508, which the Court rightly described as characterizations of the crimes and the defendant.

The Arizona Supreme Court summarized the situation well:

> The victims' statements in *Booth* only indirectly hinted at the punishment the victims were recommending. Indeed the only statements regarding sentencing were that the victims did not "think anyone should be

> able to do something like [the murders at issue] and get away with it" and that "the people who did this could never be rehabilitated." *Booth*, 482 U.S. at 508. No specific recommendations regarding sentencing were made. Thus the facts in *Booth* make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing. In *Payne*, however, the Court characterized *Booth* as prohibiting not only family members' opinions and characterizations, but also recommendations of "the appropriate sentence." *Payne*, 501 U.S. at 830 n.2.

Lynn v. Reinstein, 68 P.3d 412, 416 n.4 (Ariz. 2003).[3]

Payne thus ascribed to *Booth* a category of victim information that was not present in that case. This erroneous characterization of the victim statements at issue in *Booth* is the center of the current controversy. The Court's mischaracterization not only

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[3] That *Booth* did not consider a victim sentencing recommendation is underscored by the history of *Ohio v. Huertas*, 498 U.S. 336 (1991). In reversing a death sentence because the jury considered a victim's sentencing recommendation, the Ohio Supreme Court stated, "The type of evidence given by the victim's family in this case goes beyond that considered in *Booth* and *Gathers*. Here, a family member offered his opinion on what the appropriate sentence would be for the defendant." *State v. Huertas*, 553 N.E.2d 1058, 1064 (Ohio 1990). This Court granted certiorari, 498 U.S. 807 (1991), but dismissed the petition as improvidently granted, 498 U.S. 336 (1991), apparently because the victim's sentencing recommendation could be excluded independently under state evidentiary rules.

reserved for later consideration the question presented in this petition, but also implicitly and anomalously "preserves" a rule – a *per se* ban on victim sentencing recommendations – that did not exist in prior law.

Members of this Court have recently noted the uncertainties in victim impact jurisprudence spawned by its rulings. In *Kelly v. California*, Nos. 07-11073, 07-11425, 129 S.Ct 564, 172 L.Ed.2d 445 (2008), two petitioning murderers asked this Court to review the admission of victim impact videos into evidence at their trials. While the full Court denied certiorari, two members of this Court (Justices Souter and Stevens) would have granted review. Justice Stevens dissented from the denial of certiorari to explain, "In the years since *Payne* was decided, this Court has left state and federal courts unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms." 129 S.Ct. at 566.

B. The Impact of the Confusion Caused by this Court's Precedents is a Split of the Courts Below.

Interpreting and applying this Court's decisions in *Booth* and *Payne*, the lower courts fundamentally disagree over whether *Booth* erected a *per se* bar against victim sentencing recommendations in capital

cases and whether any such bar survives *Payne*.[4] The conflict, in essence, is one over the baseline Eighth Amendment rule before and after the dictum in *Payne*.

The Court of Appeals for the Tenth Circuit has held that "the portion of *Booth* prohibiting family members of a victim from stating 'characterizations and opinions about the crime, the defendant, and the appropriate sentence' during the penalty phase of a capital trial survived the holding in *Payne* and remains valid." *Hain v. Gibson*, 287 F.3d 1224, 1238-39 (10th Cir. 2002) (quoting *Payne*, 501 U.S. at 830 n.2). *See also Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (same). The flaw in the Tenth Circuit's reasoning is that it did not question the assertion that *Booth* considered sentencing recommendations, which resulted in a conclusion that *Payne* left intact a holding that the Eighth Amendment erected a *per se* bar against victim sentencing recommendations. As noted above, whether this bar existed in *Booth* is less than clear. Like the Tenth Circuit, the court below

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[4] With regard to non-capital cases, the lower courts agree that there is no constitutional bar against sentencing recommendations in victim impact statements. *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 289 n.51 (2003) ("Every state ruling on the constitutionality of victim recommendations in noncapital cases has held that trial court judges can hear all three types of impact evidence, including sentencing recommendations that are in the public interest.") (collecting authorities).

and the Courts of Appeals for the Eighth Circuit,[5] the Fifth Circuit,[6] and the Fourth Circuit[7] in dictum and the highest courts of Alabama,[8] Maryland,[9] New Jersey,[10] Ohio,[11] Tennessee,[12] Virginia,[13] and Washington[14] have reached similar conclusions with little to no critical analysis of the underlying assumption regarding the scope of the *Booth* holding.

The Arizona Supreme Court has questioned the assertion that *Booth* erected a *per se* bar against sentencing recommendations. Ultimately, however, the Arizona Supreme Court agreed with the Tenth Circuit. Delving further into the history of *Booth* and *Payne*, the court correctly noted that "the facts in

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[5] *See Parker v. Bowersox*, 188 F.3d 923, 931 (8th Cir. 1999), *cert. denied*, 529 U.S. 1038 (2000) (dictum).

[6] *See Woods v. Johnson*, 75 F.3d 1017, 1037-38 (5th Cir. 1996) (dictum).

[7] *See Ivey v. Catoe*, 36 Fed. Appx. 718, 725-26 (4th Cir. 2000), *cert. denied*, 537 U.S. 952 (2002) (dictum).

[8] *See Ex parte McWilliams*, 640 So. 2d 1015, 1017 (Ala. 1993).

[9] *See Ware v. State*, 759 A.2d 764, 783-86 (Md.), *cert. denied*, 531 U.S. 1115 (2000).

[10] *See State v. Koskovich*, 776 A.2d 144, 177 (N.J. 2001).

[11] *See State v. Fautenberry*, 650 N.E.2d 878, 882 (Ohio), *cert. denied*, 516 U.S. 996 (1995).

[12] *See State v. Middlebrooks*, 995 S.W.2d 550, 558 (Tenn. 1999).

[13] *See Beck v. Commonwealth*, 484 S.E.2d 898, 903-04 (Va. 1997).

[14] *See State v. Pirtle*, 904 P.2d 245, 269 (Wash. 1995), *cert. denied*, 518 U.S. 1026 (1996).

Booth make it unclear whether the Court in that case considered the effect of the Eighth Amendment on opinions regarding sentencing." *Lynn*, 68 P.3d at 416 n.4. However, the court "defer[red] to the Court's interpretation of its own case," and held that "*Payne* did not overrule and indeed left intact that portion of *Booth* which the Court itself has characterized as prohibiting victims from recommending a sentence in a capital case." *Id.*

In stark contrast to the above-cited courts stands the Oklahoma Court of Criminal Appeals, the State's criminal court of last resort, which has definitively reached the opposite conclusion and consistently permits victims to recommend the appropriate sentence in capital cases. "In at least three decisions, this Court has taken the position that *Payne* appears to have overruled *Booth* with respect to the issue of whether or not victim impact statements could include characterizations of the defendant, the crime, and opinions in regard to sentencing." *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App. 2002), *cert. denied*, 538 U.S. 985 (2003), (citing *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App. 1997), *cert. denied*, 525 U.S. 1057 (1998)), *Ledbetter v. State*, 933 P.2d 880, 890-91 (Okla. Crim. App. 1997); *Conover v. State*, 933 P.2d 904, 920 (Okla. Crim. App. 1997). Noting that this Court has denied past petitions presenting the question, and that it has "continued to approve of such evidence in other capital cases," the Oklahoma Court of Criminal Appeals reaffirmed its consistent rejection of the argument that its

"interpretation of *Payne* and *Booth*, or for that matter our own statute, is erroneous or unconstitutional." *Murphy v. State*, 47 P.3d at 885 (citing *Young v. State*, 12 P.3d 20 (Okla. Crim. App. 2000), *cert. denied*, 532 U.S. 1055 (2001), and *Welch v. State*, 2 P.3d 356 (Okla. Crim. App.), *cert. denied*, 531 U.S. 1056 (2000)).

C. Only this Court Can Resolve the Conflict as to Whether the Eighth Amendment Bars Victim Sentencing Recommendations in a Capital Case and this Case Presents an Appropriate Vehicle for Clarification.

This Court's opinions in *Booth* and *Payne* are the crux of the confusion and conflict across the country; consequently, it will only be when this Court speaks on the issue again that the conflict will be resolved. Because the courts on each side of the split have repeatedly entrenched in their positions even after consideration of the alternative, there is no value to letting the conflict continue. Further, the petition before this Court provides a good vehicle for resolution of the matter.

As noted above, a number of petitions for review from cases decided by the Oklahoma Court of Criminal Appeals have been presented to this Court. Notably, however, each posed a vehicle problem to this Court's consideration of the question presented. In two cases, the petitioner did not object and their arguments were dismissed on plain error review. *See Murphy*, 47 P.3d at 885; *Welch*, 2 P.3d at 373. The

defendant in another case failed to elicit the victim's opinion on the appropriate sentence and unsuccessfully sought to reopen the proceedings to consider her recommendation of life. The appellate court held that the victim recommendation would have been admissible, but that the trial court did not abuse its discretion in denying the motion to reopen. *Young*, 12 P.3d at 43. In *Turrentine*, the Oklahoma Court of Criminal Appeals held that any constitutional error was harmless beyond a reasonable doubt. 965 P.2d at 982. Likewise, although the Tenth Circuit has held twice that the Oklahoma courts erroneously permitted victim opinions on the appropriate sentence, it further held in each case that "this constitutional error was harmless because it did not have a 'substantial and injurious effect or influence in determining the jury's verdict.'" *Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir. 2002) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)); *see also Hain v. Gibson*, 287 F.3d 1224, 1239 (10th Cir. 2002).

This case presents no such barriers to the Court's consideration of the question presented and, by contrast, provides a vehicle for the Court to address the panoply of questions relevant to the conflict and confusion in the lower courts.

II. The Eighth Amendment Does Not Erect a *Per Se* Bar Against Victim Sentencing Recommendations in a Capital Case.

This Court can resolve the conflict in the lower courts and eliminate the confusion in the law with a straightforward clarification: the holding in *Payne v. Tennessee* that "the Eighth Amendment erects no *per se* bar" against victim statements to the jury includes statements about the appropriate sentence. 501 U.S. at 827. "There is no reason to treat such evidence differently than other relevant evidence is treated." *Id.* This reading would be well in line with this Court's Eighth Amendment jurisprudence.

This Court has long recognized that the Eighth Amendment's prohibition on cruel and unusual punishment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U.S. 349, 378 (1910). Further, the Eighth Amendment's prohibition against cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). "Evolving standards of decency that mark the progress of a maturing society" recognize that victims, like defendants, should be fully heard at sentencing.

A. Fairness to Victims at Sentencing is Critical to the Administration of Justice.

The cornerstone of this Court's decision to overrule *Booth* (and the follow-on decision in *Gathers*) was fairness – fairness to the victim and fairness in the administration of justice. The *per se* bar to victim impact statements erected by *Booth* "unfairly weighted the scales in a capital trial." *Payne*, 501 U.S. at 822.

In *Payne*, this Court noted that a litany of persons – the defendant's girlfriend and parents, and even a psychologist – testified favorably about the defendant during sentencing, *id.* at 825-26, while very little was allowed to be said about the victim. *Id.* at 826. The fact that this litany of the defendant's family and friends were testifying in a capital sentencing hearing also makes plain that the defendant's witnesses were implicitly (and perhaps even explicitly) offering *their* opinion on the appropriate sentence – i.e., that the defendant should not receive a capital sentence.

In *Payne,* this Court recognized the manifest unfairness of the *per se* bar erected by *Booth* and quoted the Tennessee Supreme Court approvingly:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon the

> character of, or the harm imposed, upon the victims.

Id. at 826 (*quoting State v. Payne*, 791 S.W.2d 10, 19 (Tenn. 1990)).

During the penalty phase of a capital trial, Utah law specifically affords the defendant a right of allocution. *See* Utah Code Ann. § 76-3-207(2)(b). This right of allocution permits not only the defendant, but also his family, to recommend a sentence to the jury. Utah law regarding defendant allocution is similar to those in the vast majority of states, as "courts regularly allow 'pleas for mercy' by defense witnesses. Allocution, when the capital defendant himself addresses the sentencing authority on the question of death, inevitably bears a close similarity as well." Wayne A. Logan, *Opining On Death: Witness Sentence Recommendations in Capital Trials*, 41 B.C. L. REV. 517, 545-46 (2000).

In Utah, victims are statutorily and constitutionally afforded a similar right to allocute. *See* Utah Const., art. I, § 28; Utah Code Ann. § 77-38-4(1)(b); and Utah Code Ann. § 76-3-207.[15] Despite this clear expression of the view of Utah's citizens, the Utah Supreme Court has now effectively limited the breadth

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[15] This statute was passed in the wake of *Payne* and *after* the Utah Supreme Court raised questions about the admissibility of victim impact evidence in Utah capital cases as a matter of state law. *State v. Carter*, 888 P.2d 629, 652-53 (Utah 1995), discussed below. *State v. Ott*, No. 20040638, 2010 WL 11138 at *5 (Utah Jan. 5, 2010).

of victims' rights, based on its conclusion that "The testimony offered at Mr. Ott's sentencing falls squarely within the categories of evidence identified as inadmissible, in capital sentencing hearings, by *Payne* and *Booth*." *State v. Ott*, No. 20040638, 2010 WL 11138 at *9 (Utah Jan. 5, 2010). Thus, despite this Court's decision in *Payne*, fairness for victims remains elusive because, regardless of similar legislatively crafted rights for defendants and victims, court interpretation of those rights is creating vast disparity in the meaning of each.

B. State Law Has Evolved to Recognize that Victim Allocution at Sentencing, Including Sentencing Recommendations, is a Necessary Component of Fairness and Justice.

States across the country recognize the importance of victims being given the opportunity to speak freely at sentencing. "The constitutions or statutes of forty states either explicitly or implicitly grant victims the right to give recommendations at sentencing. Twenty-three of these states grant victims the constitutional right to address the sentencing authority. Seventeen states do not have the right in their constitutions but grant the right by statute."[16] As noted above, Utah is among the states providing

[16] *See* Douglas E. Beloof, *Constitutional Implications of Crime Victims as Participants*, 88 CORNELL L. REV. 282, 286-87 (2003); *see also id.* at 301-05 (collecting authorities).

victims in capital cases with the right to be heard at sentencing. Likewise, federal law entitles victims to "make a statement or present any information in relation to the sentence." Fed. R. Crim. Proc. 32(c)(3)(E).[17]

By overwhelmingly passing legislation allowing victims to speak freely at sentencing, states across the country are recognizing a basic principle – that victims are affected by the underlying crime and therefore should, like the defendant, have an unfettered voice at sentencing.[18] As Justice O'Connor observed,

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[17] The Crime Victims' Rights Act, 18 U.S.C. § 3771(a), also requires that victims be given the right to be reasonably heard at sentencing. 18 U.S.C. § 3771(a)(4). Congress intended this right to include the right to give a sentencing recommendation. 150 Cong. Rec. S2468 (daily ed. Apr. 22, 2004) (statement of Sen. Kyl) ("When a victim invokes this right [to be heard] during plea and sentencing proceedings, it is intended that he or she be allowed to provide all three types of victim impact – the character of the victim, the impact of the crime on the victim, the victims' family and the community, and sentencing recommendations."); *see also id.* (statement of Sen. Feinstein) ("The victim of crime, or their counsel, should be able to provide any information, as well as their opinion, directly to the court concerning the release, plea, or sentencing of the accused.")

[18] Social scientists have noted the "secondary harm" that may befall victims of crime when they feel they are not given a meaningful role in the criminal justice process. *See, e.g.*, Dean G. Kilpatrick & Randy K. Otto, *Constitutionally Guaranteed Participation in Criminal Proceedings for Victims: Potential Effects on Psychological Functioning*, 34 WAYNE L. REV. 7, 22-25 (1987) (describing victims' further victimization by the criminal justice system); Uli Orth, *Secondary Victimization of Crime Victims by Criminal Proceedings*, 15 Social Justice Research 313, 314 (2002) (noting that "secondary victimization" by the

(Continued on following page)

> The Eighth Amendment stands as a shield against those practices and punishments which are either inherently cruel or which so offend the moral consensus of this society as to be deemed "cruel and unusual." Certainly there is no strong societal consensus that a jury may not take into account the loss suffered by a victim's family or that a murder victim must remain a faceless stranger at the penalty phase of a capital trial. Just the opposite is true. Most states have enacted legislation enabling judges and juries to consider victim impact evidence.

Payne, 501 U.S. at 831 (O'Connor, J., concurring) (internal quotations omitted).

The only barrier in the way to fully effectuating the victim's right to freely speak at sentencing is the confusion left by the wake of this Court's dictum in *Payne*. The Court in this case can ensure that victims' rights, as they have been codified across the nation, are given their full meaning.

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criminal justice system can negatively influence victims' "self-esteem, faith in the future, trust in the legal system, and faith in a just world"). This secondary harm is felt most acutely when the victim perceives that she has been treated poorly in relation to the defendant. *See* Task Force on the Victims of Crime and Violence, *Executive Summary: Final Report of the APA Task Force on the Victims of Crime and Violence*, 40 Am. Psychologist 107, 109 (1985) (noting secondary harm occurs because the victim "perceives that the 'system's resources are almost entirely devoted to the criminal, and little remains for those who have sustained harm at the criminal's hands' ").

C. Any Danger of Prejudice from Victim Allocution that Includes a Sentencing Recommendation Can be Tempered by the Use of Evidentiary Rules and Does Not Require a *Per Se* Bar.

Courts in non-capital cases clearly recognize that victims, like defendants, should have the right to speak freely at sentencing. In fact, as noted above, no court has held that the Constitution prohibits victims from opining on the appropriate sentence in non-capital cases.[19]

While death is different, no salient differences distinguish capital and non-capital cases when it comes to the victim's right to make a statement at sentencing. Ultimately, any Constitutional rationale for excluding certain types of victim impact evidence in capital cases would turn on the possibility of prejudice to the jury.[20] Notably, social science research "directly contradicts the assumption that jurors are readily influenced, much less prejudiced, by participant recommendations."[21]

Moreover, the evidentiary rules, under which "courts routinely exclude evidence that is unduly inflammatory," *Payne*, 501 U.S. at 831 (O'Connor, J.,

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[19] Beloof, *supra* note 16, at 289 n.51.

[20] *Id.* at n.60.

[21] *Id.* (citing Theodore Eisenberg et al., *Victim Characteristics and Victim Impact Evidence in South Carolina Capital Cases*, 88 CORNELL L. REV. 306, 340 (2003)).

concurring), can contain any risk that a victim's sentencing recommendation to a capital jury would be unduly prejudicial. Similarly, the Due Process Clause controls the risk of prejudice in cases where "a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it fundamentally unfair." *Id.*

No justification exists to single out victim opinions about the appropriate sentence for a *per se* bar. The Oklahoma Court of Criminal Appeals has recognized the lack of logic and unfairness in singling out victim sentencing opinions for *per se* treatment and allows "a simple statement of the recommended sentence without amplification."[22] A *per se* bar to all victim capital sentencing recommendations is unnecessarily broad given the ability of the trial court to properly focus the jury's deliberations and maintain courtroom decorum through the use of instructions.[23]

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[22] *Conover v. State*, 933 P.2d 904, 921 (Okla. Crim. App. 1997).

[23] In this case, the Utah Supreme Court never addressed whether the victims' family could give some limited form of opinion about the crime or the sentence. Instead, it flatly held that the Constitution (as interpreted by this Court in *Booth* and *Payne*) barred any opinion evidence whatsoever. Consequently, this Court does not have a record before it of how rules and court instructions can properly contain any risk of prejudice.

CONCLUSION

For the foregoing reasons, and for those provided by Petitioner, the Court should grant the petition for certiorari.

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